UNITED STATES CIRCUIT COURT, FOR THE DISTRICT OF NEW HAMPSHIRE.

No. 467 Law.

The Trustees of Dartmouth College

vs.

The International Paper Company.

Before Judge Edgar Aldrich as Master.

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SUMMARY OF FACTS LAW AND DISCUSSION PREPARED FOR ORAL ARGUMENT

July 28, 1903,

BY

FRANK S. STREETER.

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UNITED STATES CIRCUIT COURT, FOR THE DISTRICT OF NEW HAMPSHIRE.

No. 467 Law.

THE TRUSTEES OF DARTMOUTH COLLEGE

vs.

THE INTERNATIONAL PAPER COMPANY.

Before Judge Edgar Aldrich as Master.

SUMMARY OF FACTS LAW AND DISCUSSION PREPARED FOR ORAL ARGUMENT

JULY 28, 1903,

BY

FRANK S. STREETER.

INTRODUCTORY STATEMENT.

The writ, now containing a single count in trover, is dated July 12, 1900, and alleges a wilful conversion by the defendant at Rumford Falls in the state of Maine, on, to wit, June 1, 1900, of 14,000,000 feet of spruce, fir, and hemlock timber belonging to Dartmouth college, of the value of $275,000.

March 20, 1902, the defendant confessed the right of the college to recover $17,001.20 damages as of April 1, 1902, and, as to the residue, pleaded the general issue.

May 31, 1902, the defendant moved for leave to withdraw the plea of confession, and the motion was denied by the court (ALDRICH, J.) June 26, 1902.

June 21, 1902, the defendant became default and the default was entered of record. By the default the defendant admitted that the college was entitled to the possession and right of posses-

NOTE.—Article VI, Waste, and Article VII, Values, prepared by Allen Hollis.

sion of a quantity of timber, and that the defendant as trespasser had unlawfully converted the same to its own use prior to the date of the writ, July 12, 1900.

Upon the question of damages, the plaintiffs claimed the right of trial by jury. This right has thus far been denied by the court (ALDRICH, J.), and the plaintiffs have seasonably excepted and filed their bill of exceptions. The court ordered (Appendix E, *infra*, *p.* 107) that as a preliminary step, the character of the cutting, size of trees cut, and quantity in feet, and such other facts as either party might wish, should be determined by a master, and that the findings of the master should be treated as conclusive or as evidence to the jury or as of no consequence, as sound discretion or the law might require. The plaintiffs excepted to the order referring any part of the case to a master, and duly filed their bill of exceptions.

Then the plaintiffs, especially reserving their rights under their exceptions, agreed that Judge Aldrich should act as master, and he was duly appointed.

There was a variance between the original order of reference to the master and the form of the commission subsequently issued. By the latter it is made to appear that the entire question of assessment of damages was submitted to the master instead of particular preliminary issues as specified in the order. (The discussion on this point is set out in the record, Vol. I, *pp.* 1–33.)

The plaintiffs have not waived their right to a trial by jury.

In 1888 the right to take from the College Grant the spruce and other timber, eight inches and over in diameter, twenty feet from the butt, upon definite conditions hereinafter set out, was granted to George Van Dyke, and an attempted assignment of the same was made by him to the Supply Company, January 5, 1893; but the validity of the assignment was not recognized by the college until the execution of the agreement of June 9, 1900. With the consent of the college and everybody interested, the Rumford Falls Paper Company had cut, under the terms of the lease, during the seasons from 1893 to 1898.

The defendant entered upon the College Grant in the fall of 1898 and conducted a logging operation. The operation was in secret, *i. e.*, without notice to or knowledge of the college, the Rumford Falls Paper Company, or the Supply Company, the only interested parties. Practically all of the logs so cut had been piled upon the banks of the streams on the College Grant before February 10, 1899. The defendant began to remove the logs from the Grant, April 27, 1899. (Thomas' Dep., Int. 150, *p.* 34.) The logs were driven down the river and arrived in Rumford Falls boom the 23d and 24th days of June, 1899. (Thomas' Dep., Int. 151.)

The defendant admits that, according to its own scale bill (Burbank's Dep., Int. 223, *p.* 47), it cut and carried away 143,924 pieces of spruce, containing 11,051,390 feet, and 8,046 pieces of fir, containing 523,900 feet, or a total of 151,970 pieces of timber, containing 11,575,290 feet, and that they had 11,575,290 feet of timber in the boom at Rumford Falls, Maine, June 24, 1899, which they had taken from the College Grant the previous season.

Of the foregoing amount, about 8,000,000 feet had been converted into pulp and paper stock prior to the date of the writ, July 12, 1900. (Abbot, Dep. Ints. 143 to 180, *pp.* 83–6.)

The first intimation which the college received of the operations was in a letter dated March 15, 1899, which was not relied upon (CHASE, Vol. II, *p.* 722, Int. 14; *p.* 724, Int. 19), and in a second letter dated April 11, 1899 (CHASE, Vol. II, *p.* 725 *et seq.*) On November 30, 1898, the college had been informed that no cuttings were to be made on the Grant the following winter. (CHASE, Vol. II, *p.* 719).

On July 26, 1899, the college, having no knowledge of material facts afterwards discovered, brought suit against the defendant, *ad damnum* $75,000, alleging the trespass as of September 15, 1898, and thereafter (Vol. II, *p.* 714) and at the same time gave notice to take depositions (HOLLIS, Vol. II, *p.* 908). During the summer, the college sent a force of surveyors upon the Grant

under the direction of Mr. Gile, to examine the extent of the cuttings and the amount of timber taken.

Under his direction sample half acres, representative of the entire cutting, were located by Mr. West, and the amount taken away and the amount left in tops and whole trees ascertained by measurement. For the purposes of this case, it has been agreed that the defendant's scale bill shall be taken as a correct statement of the timber received by the defendant at Rumford Falls, namely, 11,575,290 feet. Mr. Gile also made a survey of the total areas operated over upon all the tracts, except three, and they computed the amount of timber which had been taken from the Grant, and in addition thereto the amount of merchantable timber left in tops and whole trees, estimated at over two million feet.

A conference was had in Boston in the summer of 1899 between Chisholm, Burbank, and Drew, representing the defendant and B. A. Kimball and Streeter, representing the college. (Burbank's Dep., Ints. 58, cross. 1 to 5, *pp.* 15, 64.)

There is evidence that negotiations and long conferences for a settlement were had during the winter of 1899 and 1900 between the parties. (I Rec., *p.* 179, *et seq.*, II Rec., *p.* 276, *et seq.*)

During the winter of 1899 and 1900 the Supply Company operated upon the grant. The college brought suit against the said company, claiming that the original assignment of the lease was invalid, and that the Supply Company was taking what are called "second cuttings," untakable under the lease. (II Rec., *p.* 176.) This controversy was adjusted by the agreement of June 9, and the assignment of June 26, 1900, hereafter referred to.

In the present action also the plaintiffs claim that a large portion of the defendant's cuttings were unauthorized under the terms of the lease, and were what, for convenience, have been termed "second cuttings," that is, cuttings which in any event belonged to the college and not to the assignee of the lease, namely, the Supply Company. The defendant claimed that there were no such cuttings. (II Rec., *p.* 676.) The controversies on that point

are set out in the agreement of June 9, 1900, between the college and the Supply Company. (II Rec., *pp.* 173–181.)

If the defendant's claim that there were no second cuttings, so called, were correct, the compensation for the defendant's unlawful acts would belong to the Supply Company, and, in any event, a portion of such compensation would belong to that company, unless the assignment by Van Dyke, Jan. 5, 1893, were invalid. It is obvious that this situation would enable a vigorous and alert defendant (as this defendant has shown itself to the court to be) to play off against each other the respective claims of the lessor and lessee against it. In trying to negotiate a settlement with the college such a defendant could say that the damages belonged to the Supply Company, and *vice versa*. Under such circumstances, the situation of the college and the Supply Company demanded that their claims against this trespasser should be united. For this reason the agreement of June 9, 1900, between the college and the Supply Company, which was put in evidence by the defendant (II Rec., *p.* 173), was executed. By that agreement all the existing controversies between the college and the Supply Company were settled. The damages recoverable from the trespassing defendant were adjusted as between themselves. The college ratified the assignment of the lease to the Supply Company, discharged its claims against said company, and dismissed its suits. The Supply Company dismissed its action against the college and assigned to the college all its claims growing out of the defendant's trespass.

The officers of the Supply Company then knew the facts relating to the trespass and had many letters and other documents showing that the defendant's entry was wilful, reckless, and with negligent disregard of the plaintiffs' rights, without reasonable grounds for believing that it had the right to enter or cut, and that its removal of the timber was with full knowledge of the unlawfulness of its act.

Prior to June, 1900, the college was not informed of such facts tending to establish defendant's bad faith (HOLLIS, II Rec., *p.* 908),

but under the agreement of June 9, 1900, all the letters and other documents tending to show the truth as to the wilful and reckless character of the defendant's trespass were turned over to the college.

June 26, 1900, the Supply Company, in accordance with the agreement of June 9, executed an assignment to the college of all its claims against the defendant growing out of the operations on the College Grant during the winter of 1898–'99.

The college thereupon became nonsuit in the action brought July 26, 1899, and began this action, July 12, 1900. The writ originally contained two counts, one in trover and a second in case, counting on the assignment of June 26, 1900, but the second count was subsequently eliminated by amendment.

At the trial, independently of the agreement of June 9, 1900, and the assignment of June 26, 1900, the plaintiffs claimed that they have the right to recover the entire damages in this action and that, therefore, there was no occasion to determine the amount of first or second cuttings, so called; and the parties stipulated that that question should be eliminated for the time being and if that question should become material in determining the damages, it may subsequently be heard and determined by the master. (II Rec., *pp.* 676–677.)

Statement of Plaintiffs' Claims.

The plaintiffs claim

(1) That independently of the assignment by the Androscoggin Timber Supply Company to the college of June 26, 1900, the college may maintain trover and recover in this action the value of all the property converted at Rumford Falls, as the same stood at the date of the writ.

Authorities, *infra*, *p.* 104.

(2) That the college may maintain trover and recover in this action the value of all the merchantable timber cut down and left upon the Grant at the end of the defendant's operations, to wit, 2,003,661 feet;

(3) That the defendant (a) cut on the college lands 11,575,290 feet of timber without legal right or justification and without any reasonable ground for believing that it had the right so to cut; (b) that prior to the entry and cutting, it wilfully, recklessly, and negligently refrained from making any investigation whether it had any right to enter and cut, and that such investigation would have conclusively shown that its proposed entry and cuttings were unlawful and without right; (c) that its entry and subsequent operations were secret,—that is, without notice to or knowledge of the college, the Supply Company, its fellow-stockholders in the Supply Company, or any party interested in the timber; (d) that during its operations and before removing any logs from the Grant, namely, on February 1, 1899, it voluntarily and wilfully broke its contract of January 31, 1898, and thereby deprived itself of the last vestige of its unreasonable excuse for its operations; (e) that after receiving emphatic notice February 10, 1899 (as soon as its unlawful acts were discovered) that it was a trespasser and would be held strictly accountable and that it was forbidden to remove any part of the timber which had been cut, and,

after these facts had been submitted to its president and general counsel, it removed said 11,575,290 feet of timber from the Grant with full knowledge, after complete investigation, that its acts were unlawful and without justification; and, under these circumstances, said acts were wilful and as said logs and the pulp manufactured therefrom remained the plaintiffs' property, the plaintiffs are entitled to recover for the conversion thereof at or before the date of the writ, namely, for the pulp manufactured from 8,000,000 feet of its logs, valued at $210,000, and for 3,575,290 feet of unmanufactured logs, remaining at Rumford Falls on said date, valued at $37,540, with interest from the date of the writ.

Authorities, *infra*, *p.* 87.

Motion to Amend Writ.

The plaintiffs move for leave to amend their writ in this action by substituting as the amount of the *ad damnum* $325,000, instead of $275,000.

The foregoing motion was filed July 23, 1903.

CHRONOLOGICAL STATEMENT OF FACTS AND SUG GESTIONS ON QUESTION OF WILFULNESS.

1807.

June 18. Grant to Dartmouth College, known as "Second College Grant." (I Record, *p.* 402.)

The Grant was six miles square and was to be held by the Trustees forever, without alienation, and the "avails and incomes of said land shall be applied wholly and exclusively to assist the education of the youths who shall be indigent and to alleviate the expences of the members of families in this State, whose necessitous circumstances will render it impossible for them to defray the expences of an education at said Seminary without such assistance."

1888.

Sept. 7. Lease or permit by the College to George Van Dyke of the right to take timber for twenty years. (II Record, *pp.* 142–147.)

By this lease or permit Van Dyke was to take 3,000,000 feet a year for twenty years, at $1.25 per thousand for spruce, cedar, fir, and poplar, and $6.00 per thousand for old growth pine. The lease was recorded in Coös County Records, Vol. 64, *pp.* 101–104, and among others, contained the following provisions (II Record, *pp.* 142–147):

(1) That said timber should be cut *clean so far as each winter's operations might extend*;

(2) No trees to be cut smaller than eight inches in diameter twenty feet from the butt;

(3) *Only one cutting over the same territory to made during the life of said lease;*

(4) In making said cuttings no unnecessary damage to be done to the other growth;

(5) No unnecessary waste to be committed;

(6) No other growth to be used except such as may be necessary in the proper prosecution of the logging operations;

(7) All work under the lease to be done in a workmanlike manner;

(8) The scale to be made by the Holland or Bangor rule;

1888.
Sept. 7. (9) By a *scaler or surveyor to be mutually agreed upon* from year to year by the parties;

(10) That immediately upon the close of each year's cutting, said Van Dyke should *make and return a full and complete scale bill* of the season's operations to the Treasurer of said College;

(11) The expenses of scalers, including wages, to be borne equally by the parties;

(12) That the payments under said lease should be made each year *before the timber should be removed from said tract;*

(13) *That the title to the timber should remain in the said College until said annual payment should be made.*

1892. Van Dyke operated under the provisions of the lease to this date.

Dec. 13. Organization of Androscoggin Timber Supply Co., under laws of Maine by five constituent corporations. (II Record, *p.* 153.)

By-laws adopted.

Extract from By-Laws.

Art. VI, Sect. 3. Except as otherwise provided by law or by these by-laws or from time to time by vote of the directors, the president shall be the general business manager of this corporation, and shall negotiate, execute, and deliver all papers, deeds, and contracts on its behalf. (II Record, *p.* 196.)

Art. XI.—Stumpage.

Section 1. The amount of stumpage cut in any one year shall not exceed *thirty million* feet.

Sect. 2. The directors shall annually in the month of *July fix the price of stumpage* for the ensuing year.

Sect. 3. Each corporation holding shares of the capital stock of this corporation, shall be entitled to stumpage in the proportion which its holding of such shares bears to the amount of shares of capital stock issued and outstanding.

Sect. 4. On or before the first day of September in each year each corporation holding shares of

1892.
Dec. 13.

the capital stock of this corporation *shall notify the president* in writing of the amount of stumpage it will require for the ensuing year. Subject to the right of the directors to increase the amount at a later day, each corporation shall be limited to the amount stated in such notice.

SECT. 5. Each corporation giving notice as aforesaid shall take and pay for at the price named for stumpage by the directors as aforesaid, *the quantity of timber received by it in its boom each year, and shall pay its share of operating expenses for that year*, such share to be determined by the proportion which the amount of stumpage *ordered by it* bears to *the whole amount cut* for that year.

SECT. 6. The expense of all permanent improvements made by this corporation in the prosecution of its business shall be borne by the several corporations holding shares in the capital stock of this corporation, in proportion to their holdings of such shares.

SECT. 7. Except when otherwise provided by vote of the directors no stumpage shall be sold or otherwise disposed of to any person or corporation not interested in the capital stock of this corporation.

(II Record, *p.* 195; Chisholm's Dep., *p.* 147, Int. 258.)

The court will note

(1) That the president was the business manager with full powers;

(2) That not exceeding 30,000,000 feet should be cut in any one year;

(3) That the stumpage price must be fixed in July by the directors for the ensuing year;

(4) The proportion of stumpage;

(5) That notice must be given in writing before September 1 of the amount of stumpage;

(6) That the Supply Co. was to operate and the stockholding companies were to pay for the timber as received in their booms, and *their share of the operating expenses*;

(7) That the stockholding companies were not themselves to operate.

1892.
Dec. 13. Directors elected:

Daniel F. Emery, Jr., representing Rumford Falls Paper Co.;
Hugh J. Chisholm, representing Rumford Falls Power Co.;
Charles A. Brown, representing Otis Falls Pulp Co.;
E. B. Denison, representing Umbagog Pulp Co.;
Allen M. Fletcher, representing Rumford Falls Sulphite Co.

One share issued to each director representing said corporations. (Emery's Test., Ints. 70-72.)

1893.
Jan. 5. Assignment of lease by George Van Dyke to Androscoggin Timber Supply Co. (II Record, *pp.* 148, 149.)

Jan. 5. Also deed of timber lands in Oxford county, Me. (See mortgage, II Record, *pp.* 157–172.) Total consideration, $240,000, payable, $180,000 in notes secured by mortgage of the Maine land, and $60,000 in cash—Supply Co. to perform the covenants contained in the assignment of lease.

Jan. 5. Bond to George Van Dyke (II Record, *pp.* 150, 151) guaranteeing performance of covenants of the College lease by the Supply Co., assignee, executed by the constituent companies, their proportionate liability being as follows:

Rumford Falls Paper Co.,	12-30	960 shares;
Otis Falls Pulp Co.,	9-30	720 shares;
Rumford Falls Sulphite Co.,	6-30	480 shares;
Rumford Falls Power Co.,	2-30	160 shares;
Umbagog Pulp Co.,	1-30	80 shares;
		2,400

Jan. 5. The payment of the $60,000 in cash by the companies was in same proportion.

Jan. 5. Mortgage by Supply Co. to Van Dyke securing 60 notes, aggregating $180,000, with interest added to each note to the time it became due, the aggregate face value of the notes being $250,200, each containing a proviso that payment thereof might be made at any time before maturity, with the deduction of legal discount, and that the deposit of funds for that purpose

1893.
Jan. 5.

at the Merchants' National Bank, Portland, should have the effect of payment, provided that ten days' previous notice in writing should have been given to the bank of the intention of making such payment.

(II Rec., *pp.* 167–170.)

Jan. 5. Hugh J. Chisholm was either president, treasurer, or director of every one of the constituent companies (Chisholm's Dep., Int. 20, *p.* 80), and signed the guaranteeing bond as treasurer of the Sulphite Co. and president of the Umbagog Pulp Co.

Jan. 5. The five companies had subscribed for all the stock of the Supply Co. (2,400 shares, besides the five shares for directors). (Chisholm's Dep., Int. 21.)

Jan. 18. Chisholm present at meeting of Supply Co. when lease read and purchases of lands and rights under the lease were authorized. (Chisholm's Dep., Int. 52, *pp.* 92–3.)

Entire capital stock of Supply Co. then 2,405 shares. All present. (Chisholm's Dep., Int. 52.) Said five shares had been issued to the directors as the representatives of the constituent companies. (Emery, Int. 70–72, II Record, *p.* 781.)

Jan. 18. Chisholm knew that Dartmouth lease was bought for a large sum of money and that the five companies in which he was interested, including the Sulphite Co., were executing a guaranty *that covenants of the lease should be performed.* (Chisholm's Dep., Int. 55, *p.* 94.)

Jan. 18. Chisholm voted to spread lease (which had been read in his presence) on records of Supply Co. (Chisholm's Dep., Int. 58, *p.* 95.)

May. Directors of three of the constituent companies—Otis Falls Pulp Co., Rumford Falls Power Co., and Umbagog Pulp Co.—voted to sell their interests in the Supply Co. to the R. F. Paper Co. (Chisholm's Dep., *p.* 98, Int. 68.)

Such transfers would give R. F. Paper Co. 24-30 interest in stock of Supply Co. (Chisholm's Dep., Int. 72; Emery, Ints. 14–17, II Record, *pp.* 748–9.)

1893.

May. The three companies wanted to sell. Chisholm was spokesman. (Emery, Int. 18–20, II Record, *p.* 749.) *Chisholm and the others thought they could buy logs from year to year better than to operate on Dartmouth.* (Emery, Int. 30, II Record, *p.* 752.) R. F. Paper Co. owned 24-30, Rumford Falls Sulphite Co. 6-30 entire stock. Fletcher represented Rumford Falls Sulphite Co. (Emery, Int. 30, II Record, *pp.* 751–2.)

May. Little later, agreement between Emery (president) of Supply Co. representing R. F. Paper Co., and Fletcher, representing Sulphite Co., that R. F. Paper Co. should operate. (See Emery, Int. 30, II Record, *pp.* 751–2.)

Subsequent operations of Rumford Falls Paper Co. to 1898 under foregoing agreement, so far as Sulphite Co. was concerned. (Emery, Int. 31, II Record, *p.* 753.)

July 18. Letter, Emery (president R. F. Paper Co.) to College treasurer, asking for plan of Grant and notice of purchase of lease. (Error, R. F. Paper Co.) (Emery, Int. 40, II Record, *p.* 755.)

Sept. 18. Letter, Emery (president) to Trustees, notifying of arrangement to cut timber and asking appointment of scaler. (Emery, Int. 41, II Record, *p.* 756.)

Sept. 23. Letter, Chase, Trustee and member of finance committee, to R. F. Paper Co., in reply, saying, "This the first information of assignment of lease and will confer with associates." Emery, Int. 42, II Record, *p.* 757.)

Oct. 13. Letter, Chase, Trustee, to R. F. Paper Co., suggesting Doherty as scaler. (Emery, Int. 42.)

Oct. 14. Letter, R. F. Paper Co. to Chase, reporting Emery's absence. (Emery, Int. 42, II Record, *p.* 758.)

Oct. 28. Letter, R. F. Paper Co., by Emery, to Chase, Trustee, about scaler. (Emery, Int. 42, II Record, *p.* 759.)

Oct. 31. Letter, R. F. Paper Co. by Emery (president) to Chase (Trustee) about scaler. (Emery, Int. 42, II Record, *p.* 759.)

Nov. 13. Letter, Chase, Trustee, to R. F. Paper Co., about scaler and suggesting conference in Boston. (Emery, Int. 42, II Record, *p.* 761.)

1893.

Nov. 13. Letter, R. F. Paper Co. by Emery (president) to Chase (Trustee) making appointment to meet Chase and Richardson, Trustees, Boston, the next Saturday. (Emery, Int. 42, II Record, *p.* 762.)

Nov. 18. Conference in Boston—Emery, Judges Chase and Richardson, Trustees—about arranging with the College to cut on the Grant the following winter. (Emery, Int. 45, II Record, *p.* 771.)

At that conference, Trustees *would not recognize assignment of lease* nor recognize its validity, but would agree that R. F. Paper Co. might operate *if they would confine themselves to the conditions in the lease. Subsequent operations of R. F. Paper Co., so far as College was concerned, were under that agreement.* (Emery, Cross Ints. 248–250–269, II Record, *pp.* 828–835.)

Nov. 20. Letter, Joseph W. Symonds, counsel for Supply Co., to Judge Richardson, Trustee, explaining the formation of the Supply Co. by the constituent companies, the value of the guarantee of the constituent companies, etc. (Emery, Int. 43, II Record, *p.* 763.)

Dec. 2. Letter, William M. Chase, Trustee, to Emery about scaler, saying Trustees do not like the position ; *they do not ratify the assignment, and do not wish to deal with the Supply Co., stating reasons therefor.* (Emery, Int. 43, II Record, *p.* 766.)

Dec. 5. Letter, R. F. Paper Co., by Emery, to Chase, Trustee, about scaler. (Emery, Int. 43, II Record, *p.* 768.)

1894.

Feb. 17. Letter, R. F. Paper Co. by Emery (president) to George Van Dyke about complaints for improper cutting. (Emery, Int. 43, II Record, *p.* 768.)

Feb. 19. Letter, from George Van Dyke to Chase, Trustee, enclosing Emery's letter of the 17th. (Emery, Int. 43, II Record, *p.* 770.)

1893–4.	R. F. Paper Co. cut	6,134,410 feet.
1894–5.	R. F. Paper Co. cut	1,101,360 "
1895–6.	R. F. Paper Co. cut	10,521,830 "
1896–7.	R. F. Paper Co. cut	none.
1897–8.	R. F. Paper Co. cut	6,372,320 feet.
		24,129,920 "

(II Record, *p.* 911.)

1893–8.

All such cuttings under agreement of November, 1893, between Trustees and R. F. Paper Co. and by the arrangement between Emery and the Sulphite Co. (Emery, *supra.*)

1898.

Jan. 31. Rumford Falls Paper Co. had 1,120 shares stock of the Supply Co., being its original 960 shares and 160 shares originally Rumford Falls Power Co. (*Supra*, *p.* 14, II Rec. *p.* 189.)

Under agreements of May, 1893, the R. F. Paper Co. was now entitled to the 720 shares of Otis Falls Pulp Co. and 80 shares of Umbagog Pulp Co., making 800 shares. This, with its 1,120 shares, made 1,920 shares, or twenty-four-thirtieths. The 80 shares of Umbagog Co. were transferred without controversy in the summer of 1898 (Emery, II Rec., *p.* 814, Cross Ints. 178–181), but the 720 shares of Otis Falls Pulp Co. were *deliberately and wilfully withheld by its president, Chisholm*, who was also president of International Paper Co.

Jan. 31. The R. F. Paper Co., by separate documents, sold all its mills and other property to the I. P. Co. except the Supply Co. stock which it held and to which it was entitled. (Emery, II Rec. *p.* 837.)

Jan. 31. Agreement R. F. Paper Co. with International Paper Co. (II Rec., *p.* 189) to sell and transfer its stock in the Supply Co. (1,120 shares), also the 800 additional shares to which it was entitled—making four-fifths of the stock of the Supply Co.—for the sum of $266,000, and to pay four-fifths of the mortgage to Van Dyke and any other indebtedness of the Supply Co. The I. P. Co. was to pay by issuing $133,000 of its first mortgage bonds and $133,000 of its preferred stock. The five odd shares were not mentioned in contract.

It will be noted that the agreement of January 31, 1898, was solely with reference to the sale of four fifths of the Supply Co. stock and that there was no reference in the agreement, which was signed by Burbank, *to any rights in the college lands* or *any rights to operate thereon.*

Jan. 31. Chisholm was then director and first vice-president of the I. P. Co. (Chisholm's Dep., Int. 4, *p.* 77.)

Chisholm was then president of Otis Falls Pulp Co., controlled it and claimed to control it. (Emery, Ints. 57–58, *p.* 775.)

1898.

Jan. 31. Of the five separate shares issued to the directors, Chisholm had his own one share issued to him as representative of Rumford Falls Power Co., the one share originally issued to Brown as president of the Otis Falls Co., which Chisholm controlled (Emery, Int. 65, *p.* 777.) and, after July, 1898, Chisholm controlled the one share originally issued to Fletcher as treasurer of the Rumford Falls Sulphite Co., making three of said five shares which Chisholm controlled after July, 1898. After that date, when the I. P. Co. bought the Sulphite Co. stock (Emery, Int. 63, *p.* 776), Chisholm, as vice-president and president of the I. P. Co., controlled six-thirtieths (480 shares), which was the Sulphite Co. stock, and, as president of the Otis Falls Co., controlled nine-thirtieths (720 shares) originally issued to that company; so that on and after July, 1898, Chisholm, in his various capacities, actually controlled one share more than a majority (to wit, 1,203 shares) of the entire stock (2,405 shares) of the Supply Co., including therein the 720 shares of the Otis Falls Co., which, by the contract of January 31, 1898, the R. F. Paper Co. agreed to transfer to the I. P. Co. (See Discussion, Emery, II Rec., *p.* 777–781, Ints. 67–68.)

June. The I. P. Co. received the logs cut on the Grant the winter before by the R. F. Paper Co., paid all operating expenses, including the expense of driving said logs under the management of E. I. Brown. (Emery, II Rec., *p.* 837, Cross Ints. 278–299, II Rec. *p.* 851, Int. 344.)

Aug. 5. The so-called instructions from Burbank, second vice president and Manager Department of Woodland (Burbank's Dep., Ints. 7, 41, *pp.* 4, 10), to Thomas, Division Supt. of I. P. Co. (Thomas' Dep., Int. 2, *p.* 3), while riding from Errol to Berlin (Thomas' Dep., Ints. 29, 46, *pp.* 9, 12.)

These instructions and what Burbank and Thomas then knew and did not know about the matter will be considered later.

Sept. 1. (Abt.) Thomas let contracts to operators. (Wilson's Dep., Int. 40.)

Sept. 20. Contract with Lee G. and G. C. Wilson signed as of this date. (Actually signed in winter. Wilson's Dep., Int. 179.)

1898.

Oct. 31. (Burbank's Dep., *p.* 48, Int. 224.) Letter from Snow (counsel for Chisholm and I. P. Co.) to Burbank, saying that he had seen Emery about the Supply Co. notes held by Van Dyke and that the notes due had been paid, also referring to Emery's statement that he had made a proposition to Burbank in relation to these notes and had asked Snow to call Burbank's attention to the matter.

Nov. 1. (Burbank's Dep., *p.* 49, Int. 225). Letter, Burbank to Snow, acknowledging receipt of letter of Oct. 31. Knows of no proposition made by Emery except a suggestion from Perkins, involving a settlement with the Otis Falls Co., "*for which I am not empowered to act.*" *Consulted Denison (director Otis Falls Co.) and found that settlement proposed by Emery would probably not be accepted by Otis Falls Company.* Not probable that International will care to have anything to do about the notes and Emery will have to arrange to pay them himself.

Nov. 3. (Burbank's Dep., *p.* 50, Int. 226.) Letter, Emery to Burbank. Had seen Burbank's letter of the 1st about Supply Co. stock. Supposed Perkins had made a proposition. *Burbank had told Perkins he would give him answer when Chisholm returned from Europe*, middle or last of October. (Chisholm's Dep., Cross Int. 33, *p.* 158.) Recites the original agreement of 1893 that Otis Falls Co. was to turn over to R. F. Paper Co. all its stock (720 shares). Paid all Van Dyke notes as matured. Reiterates the proposition which he requested Perkins to make. Gives list of notes. Expresses desire to have matter fixed up.

Nov. 5. (Burbank's Dep., *p.* 19, Int. 81.) Letter, Burbank to Emery, acknowledging the letter of the 3d. Did not understand Perkins made definite proposition. Told Perkins would talk it over with Denison, as Otis Falls Co. was interested. Conferred with Denison and found it impossible to arrange anything until after Mr. Chisholm's return from Europe. "*As soon as Mr. Chisholm returned*" (middle or last of October, 1898) "*I brought the matter to his attention*, but I am under the impression that he has not yet had an opportunity to see Mr. Denison. I will speak to him about the matter again to-day."

Mr. Burbank knew Chisholm was officer of Otis Falls Co. (Burbank's Dep., *p.* 20, Int. 83.)

1898.

Nov. 5. Brought matter to Mr. Chisholm's attention. Don't remember what he said. (Burbank's Dep., *p.* 20, Int. 84.)

And so *prior to November 5, 1898*, the whole matter of transferring the Supply Co. stock held by Otis Falls Co. (720 shares) was considered by Chisholm as president, but he wilfully refused to act. As president I. P. Co., which had the contract of January 31, 1898, for the delivery of that 720 shares, he knew that he as president Otis Falls Co. was preventing the delivery.

Burbank thought Perkins was trying to have him act as go-between, settling up matters of Otis Falls Co. with Rumford Falls Paper Co. and he declined, "*as he had several other times, to be drawn into that fight.*" (Burbank's Dep., *p.* 21, Int. 88.)

Burbank knew there was a fight between Chisholm and Emery, representing the two companies (Burbank's Dep., Int. 93) and understood there was a general difference in many things. (Burbank's Dep., Int. 94.)

The fight was made the excuse for Chisholm's using his relations as president Otis Falls Co. to prevent delivery to I. P. Co. of the stock of Supply Co., but the real motive was disclosed by Jennings to Perkins, January 21, 1898, when he said "*it was immaterial whether they had it* (the 4-5 stock in the Supply Co.), *but they had paid about twice as much as the property was worth any way.*" (Perkins, II Rec., *p.* 866, Int. 51.)

Nov. 26. Conference between Perkins, director R. F. Paper Co., and Burbank at Burbank's office, Boston (Perkins, II Rec., *pp.* 856–861, Ints. 5–32), the object being to get Burbank's influence to have the stock of the Androscoggin Co., which Chisholm controlled, transferred to the R. F. Paper Co., so they could carry out their contract of January 31, 1898; Perkins told Burbank that if they could not get that stock and make a tender of it, *they certainly would not permit him to cut on the woodlands.* (Perkins, II Rec., *p.* 859, Int. 16.)

Perkins did not know that the Paper Co. was then operating on the College Grant and Burbank did not tell him. (Perkins, II Rec., *p.* 859, Ints. 17–20.)

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Nov. 26. WHY NOT?

The upshot of the conversation stated in letter of Nov. 29, *q. v.* (II Rec., *p.* 876), when Perkins told Burbank what they must do to make a tender—demand certain stock, force the matter by suit, and notify I. P. Co. they must cut no timber on the land.

Burbank replied in substance, "I don't see that you can do anything else." (Perkins, *p.* 859, Int. 21.) Burbank told Perkins there were some personal matters between Chisholm and Emery that he was not going to interfere with (Perkins, *p.* 860, Int. 23), and the upshot of the thing was that Burbank would not interfere between Chisholm and Emery. (Perkins, *p.* 860, Int. 27.)

Nov. 29. (Perkins, *p.* 876, Cross Int. 124.) Letter, Perkins to Emery, telling him about the conference with Burbank November 26. The stock represented the Dartmouth lease and the Upper townships. (Perkins, *p.* 871, Cross Int. 79.) (With reference to this letter, see, also, Perkins, Cross Ints. 73–126, *pp.* 870–882.)

Perkins advised Emery to force the delivery of the Otis Falls stock in the Supply Co. by making tender and demanding transfer of stock, and "*if we must fight, why, let us proceed at once.*"

The fight was to compel Chisholm as president Otis Falls Co. to deliver the stock (720 shares) which was necessary to give the I. P. Co. any rights whatever to operate on Dartmouth, and Chisholm and Burbank both knew this fact; but Chisholm was wilfully obstinate in refusing to do this and Burbank would not interfere. They, however, kept on, cutting 14,000,000 feet of timber from the land.

Burbank testifies to this same conversation but thinks the date was March, 1899, instead of November, 1898. (Burbank's Dep., Int. 80, *p.* 18.) He must be mistaken in his dates. Perkins had only one conference of this kind with him and says it was in the Boston office. Burbank says the conference was "in our Boston office in regard to cutting on this so-called Dartmouth Grant." (Burbank's Dep., Ints. 80, 235, *pp.* 18, 61.) Burbank also says, "Mr. Perkins talked with me about arranging for a settlement

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Nov. 29. between the Otis Falls Pulp Co. and the Rumford Falls Paper Co., and I told him that he mustn't ask me to do that, and then he said finally, after some quite extended conversation, that unless that was arranged he would have to notify me or take steps to prevent our taking the lumber that we had cut away from the grant." (Burbank's Dep., Int. 236.)

Plainly, Burbank and Perkins have in mind the same conversation. Plainly, Perkins has the right date, for he made a memorandum of the date (November 26, 1898), and three days later, November 29, wrote Emery. There were no negotiations between the R. F. Paper Co. and Otis Falls Co. in March. The controversy was then in suit by the bill in equity filed January 7. The answers of Chisholm and the Otis Falls Co. were dated March 27, 1899, and filed March 30. (See record of that case.) Instead of telling Burbank that unless a settlement was arranged (which would result in turning the Otis Falls Co. stock over to the R. F. Paper Co.), he would have to notify Burbank to take steps to prevent taking the timber that they had cut away from the grant, he must have notified him as stated in the letter of November 29, "that unless the stock was turned over, they (the I. P. Co.) must cut no timber upon the lands."

Dec. 11. Emery, for R. F. Paper Co., proceeded to pay all Van Dyke notes. (Emery, *p.* 784, *et seq.*, Int. 78, *et seq.*) Gave Merchants' bank notice of payment of debt (Emery, *p.* 786, Int. 83) prior to December 21, 1898. Had paid everything else except some original disbursements of Otis Falls Pulp Co. (Emery, *p.* 789, Int. 97.) To enable him to pay those disbursements he had tried to get the exact amount from the Otis Falls Co. (Emery, *p.* 790, Int. 99–102), but the Otis Falls Co. (Chisholm's company) would not furnish it (Emery, *p.* 790, Int. 103). Emery had figured the approximate amount from his own books (Emery, *p.* 790, Int. 104) and had written the approximate amount to Burbank (see Burbank's Dep., Int. 226, *p.* 52) but was unable to get a definite and exact statement from the Otis Falls Co. *This was one method adopted by Chisholm to prevent the I. P. Co. from being forced to take the Androscoggin Co. stock.*

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Dec. 21. (Chisholm's Dep., *p.* 124, Int. 171.) Letter, Emery as president of R. F. Paper Co. to Otis Falls Co., notifying the company of the payment of all the notes given to Van Dyke, requesting a statement of the amount paid on account of the Dartmouth lease with interest, and stating that he was now prepared to pay the same, and that he would then expect the Otis Falls Co. to deliver the certificates of stock in the Supply Co. now held by it, namely, the 720 shares and the one share standing in Chisholm's name.

Dec. 22. Chisholm, president of the I. P. Co., wrote, as president of the Otis Falls Co., to the Rumford Falls Paper Co.: "Referring to the verbal arrangement made sometime in the year 1892, by which you undertook to purchase our interest in the Androscoggin Timber Supply Co., we desire now to notify you that inasmuch as you have never fulfilled your part of the arrangement and have failed to make the payments to us provided by it, *we no longer consider the arrangement as in force, and decline to revive or carry out the same.*" (Burbank's Dep., *p.* 23, Int. 97.)

Dec. 28. (Snow's Opening, *p.* 16.) Emery, president of Rumford Falls Paper Co., replies to Chisholm's letter of December 22, as follows:

"We are in receipt of your communication of the 22d inst., addressed to Rumford Falls in regard to the contract with this Company, relative to the purchase of your interest in the Androscoggin Timber & Supply company. In reply we beg to say that your position in the matter is untenable, both in equity and in law, and this letter is to demand that you name the sum to which you are entitled for cash disbursements made to George Van Dyke, or his representatives, on account of the Dartmouth lease and improvements.

"We have several times before this requested you to name us the amount, and, although you have verbally promised to be (so?) do, have failed to comply, *and we now demand the same of you without further delay or subterfuge.* Failing to obtain this from you at once, we shall take steps to enforce the carrying out of your part of the contract, ours having been faithfully performed."

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Jan. 7. Notice of annual meeting to be held January 18, 1899, of the Supply Co., signed by Snow as clerk, Mr. Snow then being counsel for Chisholm and the I. P. Co. (See correspondence with Snow, *supra*, and records of the equity suit, *infra*.) Chisholm had told Burbank that he was to have this meeting of Supply Co., but Burbank says he did n't tell him the purpose. (Burbank's Dep., *pp.* 41–42, Ints. 188–193.)

It will be noted that at this time, Chisholm, through the Otis Falls Co. (720 shares) and the Sulphite Co. (480 shares), with the three shares [Chisholm (1), Brown (1), Fletcher (1),] controlled a majority of the stock of the Supply Co. (*supra*), and that there had been no meeting since 1892. (See Emery's protest, Emery, II Rec., *p.* 799, Int. 130.) If Chisholm had not been enjoined from voting by the supreme court of Maine, and the meeting had been held as notified, *he would have controlled the votes at that meeting and executed his purpose stated in the letter of Dec. 22, supra.*

Jan. 7. The Rumford Falls Paper Co. filed bill in equity against Otis Falls Pulp Co. and Hugh J. Chisholm, setting forth the original purchase of the Otis Falls interest in the stock of the Supply Co., its performance of the agreement of purchase, Chisholm's letter of December 22 repudiating the same, and Chisholm's attempt to control a majority of the stock of the Supply Co., and praying for an injunction against the two defendants from voting on the stock *or granting to any one the right to operate on or interfere with the timber lands.* (See record of equity case.)

Emery had no suspicion that the I. P. Co. were then operating on the Grant. (Emery, *p.* 803, Int. 143.)

Jan. 7. Service of the subpœna on Denison as vice-president Otis Falls Pulp Co. (Record of equity case.)

Jan. 10. Special petition for injunction against the defendants and recital that bond had been filed. The injunction issued against both defendants enjoining them from transferring any certificates of capital

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Jan. 10. stock in the Supply Co., and enjoining them from voting on said certificates of stock, or *granting to any one the right to operate on or in any way interfere with the timber lands set out in said bill, and from all attempts directly or indirectly to accomplish such objects.* (See record.)

Jan. 13. The foregoing injunction was personally served on Chisholm in New York. (See record.) (Chisholm's Dep., *p.* 105, Ints. 93–95.)

Jan. 13. (Burbank's Dep., *p.* 25, Int. 103.) Letter, Burbank, first vice-president I. P. Co., to R. F. Paper Co., reciting agreement of January 31, 1898, to deliver within three months four-fifths stock of the Supply Co., and to produce evidence of payment of four-fifths of all indebtedness of said company, closing with the following statement and notice:

"*We have repeatedly requested you to carry out the said agreement but without success, and we now desire to notify you that unless this agreement is carried out on or before the first day of February, 1899, in all respects, we shall regard the agreement as terminated, and shall refuse to complete said purchase after said date.*"

It must be conclusively presumed that this letter was dictated by Chisholm, the president I. P. Co., although Burbank (Int. 106) does not think he had a conference with him and so he can't say whether he knew the letter was sent; Burbank, the vice-president, did not take the personal responsibility of writing the same. *He consulted Jennings, the general counsel* (*p.* 27, Int. 104), and Jennings (at any rate eight days later) was also acting as Chisholm's personal counsel (Perkins, *p.* 861, Int. 42).

It must also be presumed that this letter was written January 13, 1899, *after* the service of the injunction upon Chisholm. If Burbank did not talk with Chisholm January 13, the conference with Jennings about sending this notice was quite as effectual. It cannot be presumed that Chisholm and Jennings were not informed of the operations then being conducted by the I. P. Co. on the Grant. It will be noted that they continued to cut the

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Jan. 13. timber from the Grant secretly—that they did not tell anybody that they were cutting. The college found it out in April. (C. P. Chase, Record, *p.* 725); R. F. Paper Co., and Emery found it out the latter part of January, 1899. (Emery, *p.* 803, Int. 143.)

Jan. 16. (Burbank's Dep., *p.* 29, Int., 116.) Letter of R. F. Paper Co. by Emery to Burbank, replying to letter of January 13, referring to the agreement of January 31, 1898, to deliver the Supply Co. stock, and stating that the R. F. Paper Company had used every possible effort to carry it out, *that their failure was due solely to Mr. Chisholm's action, which they assume must be well known and understood by the I. P. Co.;* that after the agreement of January 31, 1898, was made, the R. F. Paper Co. attempted to close up its affairs and distribute a portion of the assets, but were enjoined on the application of Chisholm; that Chisholm refuses to transfer the one share standing in his name which Snow had led them to believe would be delivered without question; *that no one is to blame for the delay but the president of the I. P. Co.;* that if the I. P. Co. desired an immediate completion of the contract, they could bring it about by insisting that Chisholm as president of the Otis Falls Co. make it possible to do as agreed, and that if the I. P. Co. desired to bring about by mutual agreement an abrogation of the contract of January 31, 1898, send a request that may call a meeting of the directors.

If will be noted that in this letter Mr. Emery did not commit himself to any future course of action.

No reply to this letter was made.

Burbank gave the letter to *Jennings* and left the matter with him. (Burbank's Dep., *p.* 31, Ints. 118–121.) Burbank thought Jennings better able to take up the matter than he was. (Burbank's Dep., *p.* 31, Int. 122.) Can give no reason why he did not not ask Chisholm about the truth of the statements. (Int. 123, *p.* 32.) Can give no reason why he did not further confer with Jennings. (Burbank's Dep., *p.* 32, Int. 125.) Burbank noticed the statement in Emery's letter that for any delay there was no one to blame but Chisholm. (Int. 127, *p.* 32.) Burbank can't say why he did not ask Chisholm about that statement. He thinks he had troubles of his own. (Int. 130.) *Made no further in-*

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Jan. 16. *vestigation of facts stated in the letter.* (Int. 122.) *Did not subsequently think about them.* (Int. 133.) Chisholm said nothing to Burbank about Emery's charges. (Burbank's Dep., Int. 134.) *After turning letter over to Jennings, subject never mentioned between Burbank and Jennings or Burbank and Chisholm until after July, 1900.* (Burbank's Dep., Int. 135.) *Burbank made no reply to letter of January 16.* (Int. 136.)

Jan. 17 or 18. After Emery sent the foregoing letter of January 16, Snow came to his house (Emery, *p.* 801, Int. 136), and said Jennings wanted Emery to go to New York to see him (Emery, *p.* 802, Int. 140). Emery declined but said he would ask Mr. Perkins to call on Jennings and see what he had to communicate. (Int. 141.)

Jan. 21. Perkins called on Jennings at Emery's request at suggestion of Snow, and immediately after the talk, wrote Emery fully about it (Perkins, II Rec. *p.* 862, Ints. 35–38), told Jennings why he called (Perkins, *p.* 863, Int. 39). Jennings told Perkins that he was counsel for Chisholm personally (Perkins, *p.* 864, Int. 42). Perkins told Jennings that if he was acting as counsel for the I. P. Co. and Chisholm, it was not fair to call him in as layman (Perkins, Int. 43). Then Jennings said he was not acting as counsel for Chisholm (Perkins, Int. 46). Then Perkins told him that he understood he was there to see if some arrangements could not be made for the transfer of that stock (720 shares of Supply Co. stock held by the Otis Falls Co., of which Chisholm was president), so the R. F. Paper Co. could transfer deeds and complete obligations (Perkins, Int. 47). Jennings replied that the time had expired or had been extended to February 1st or early February, and *they did not care whether they had the property or not* (Perkins, *p.* 865, Ints. 47–48). Jennings did say that they had extended the time to February 1st, "*that it was immaterial whether they had it or not, that they paid about twice as much as the property was worth anyway.*" (Int. 51.) The property represented by the stock of the Supply Co. was the property "*that Jennings said the International Co. had paid twice as much as it was worth.*" (Int. 54.) That stock of the Supply Co. represented the Upper towns and the unexpired balance

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Jan. 21. of the Dartmouth lease and nothing else. (Perkins, Cross Int. 77–81).

With reference to any adjustment Jennings said there were some outside matters, differences of Otis Falls Co., and perhaps one or two others that must be fixed up. (Perkins, Int. 55.) Perkins told Jennings that he knew nothing about those matters and would not discuss them, that he was there for another purpose which he had stated (Perkins, Int. 56). When Jennings told Perkins that the R. F. Paper Co. had not carried out their agreement with the International, *Perkins replied that they had been prevented by the president of the I. P. Co.*

Perkins, a director in the R. F. Paper Co., had then no knowledge that the I. P. Co. was operating on the lands (Int. 59). *Jennings made no intimation or suggestion that the I. P. Co. was operating, leaving Perkins in the dark on this point* (Int. 58).

Perkins, on the same date (Jan. 21), wrote Emery fully about the talk with Jennings (Perkins, Int. 38). The original press copy of the letter was produced, offered to the defendants to put in evidence if they desired, and examined by them (Int. 49, *p.* 866).

Jan. 18. At the meeting of the Supply Co., called by Snow, on the 7th, Emery filed a protest, reciting the facts stated herein and the service of the injunction restraining Chisholm and the Otis Falls Co. from voting, and moved that the meeting be adjourned until June 30, 1899. (II Rec., *p.* 799.)

Jan. The only time Thomas was at College Grant during the winter was prior to February 10. (Thomas, 1 Rec., *p.* 57, Ints. 63 to 69.) Thomas had talk with Q. B. Davis at this time (Q. B. Davis' Dep., Int. 538, *p.* 256; Cross Int. 552, *p.* 259.) Said they might as well sign Davis contract as Wilson. (*Ib.*, Int. 539.) Said, "*I supposed we had a right to log up here. This winter's cut would not make our share.*" (*Ib.*, Int. 540.) Davis had heard before that there was trouble between companies, and didn't hear it from Mr. E. I. Brown. (*Ib.*, Cross Int. 546 to 549, *p.* 258.)

Burbank obtained by-laws of Pettengill about this time (Burbank's Dep., *p.* 38, Int. 160, *et seq.*), apparently before receipt of letter of February 10.

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Jan. 31. (About this date.) Emery received first intimation that I. P. Co. had intended to operate or were operating on the Grant that winter. (Emery, II Rec., *p.* 893, Int. 143.) He then sent E. I. Brown to see if anyone was on the Grant, and what they were doing. (Emery, *p.* 803, Int. 144.)

Feb. 4. Brown made his report. (Emery, II Rec., *p.* 803, Int. 146.

Feb. 10. As a result of information in Brown's report Emery as president of R. F. Paper Co., February 10, 1899, wrote Burbank (Emery, II Rec., *p.* 804, Ints. 147–149) the following letter (Burbank's Dep., *p.* 11):

"We have just been informed that different parties have been operating on the 'Dartmouth College Grant,' under the directions of some one representing your company.

"The Rumford Falls Paper Company, as you know, is the owner of twenty-four-thirtieths of the property in question, and these operations have been carried on without its knowledge or permission and decidedly against its interests.

"This is the same property about which an agreement was made to sell it to you almost a year ago, and which we have been prevented from consummating by the action adopted by persons holding official positions in your own company, the details of which we more fully explained to you in our letter of the 16th ultimo.

"Not only are we informed that a large amount of timber has been cut, but that the operations have been conducted in such a way as to very seriously injure the value of the property.

In order that you may not be misled, we immediately notify you that these operations are without authority, and the parties who have assumed to act in the premises are mere trespassers, and we shall hold the persons operating thereon strictly accountable for the damage which has been done, and we absolutely forbid the removal from the premises of any part of the lumber which has been cut."

1899.
Feb. 10. Burbank went to Chisholm to confer about the letter (Burbank's Dep., *p.* 36, Int. 147) *and referred the letter to Mr. Jennings* (Burbank's Dep., *pp.* 35–36, Ints. 142–145). *To this extraordinary letter of February 10 no reply was made.* (Burbank's Dep., Int. 137.) (Emery, II Rec., *p.* 804, Int. 150.) *Burbank had not notified the R. F. Paper Co., Emery, the College, or anybody else of the operations on the Grant for the I. P. Co. that winter.* (Burbank's Dep., *p.* 34, Ints. 138–141). Mr. Jennings said nothing to Burbank about the letter after it was turned over to him. (Burbank's Dep., *p.* 36, Int. 146). Burbank called Chisholm's attention to the charge that the I. P. Co. were trespassers (Burbank's Dep., Ints. 147–148), but did not recall any particular conversation about it (Burbank's Dep., *p.* 36, Int. 149). *With the letter before them charging that they were trespassers and absolutely forbidding the removal of any part of the lumber which had been cut, neither Chisholm nor Burbank discussed the question whether they would stop the operations, and the subject was not mentioned.* (Burbank's Dep., *p.* 37, Int. 154, 155.)

When Burbank received notice that they were trespassers, he says *he talked with Thomas* in regard to the claim that they were cutting improperly, and that Thomas told him that he had the same men cutting there that had cut for Emery in previous years (Burbank's Dep., *p.* 63, Int. 239), but Thomas does not remember such talk. (Thomas' Dep., *p.* 24, Int. 103–105.) Thomas thinks that he got a letter from Burbank before starting the drive, that Emery had forbidden removing the logs (Thomas' Dep., *p.* 25, Int. 105). Letter can't be produced (Thomas' Dep., Ints. 106–110), *but the instructions were to go ahead with the drive, to drive them out* (Thomas' Dep., *p.* 26, Ints. 113–115.) He proceeded to remove the logs on the instructions of Burbank (Thomas' Dep., Int. 148). Thomas thinks he was acting in good faith by doing as he was told to do. (Thomas' Dep., Ints. 158–160.)

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But Thomas had full knowledge (*see infra*, *p.* 55.)

March 30. Answers of Chisholm and Otis Falls Co. to bill in equity of January 7, filed in the supreme court of Maine. (See record of case.) Chisholm, among other things, *denies* that the R. F. Paper Co. ever became the owner of twenty-four-thirtieths of the Supply Co. stock *or ever became entitled to the nine-thirtieths of said stock owned by the Otis Falls Co., or to the one share standing in the name of Charles A. Brown, or to the one share standing in the name of Allen M. Fletcher, or to the one share standing in the name of himself*, and Chisholm claimed therein to be the owner in his own right of the one share and asks the plaintiff to prove that 1,203 shares are a majority of 2,405 shares.

The Otis Falls Co., answering the bill in equity of January 7, set out the votes of May 13, 1893, for the sale of the nine-thirtieths, 720 shares, in the Supply Co., to the R. F. Paper Co., also refer to the votes of the other two constituent companies, but say that said votes do not include the three shares issued to the representatives of the three companies on the board of directors of the Supply Co., that the authority conferred by the vote of the Otis Falls Co. was never exercised, and that the *proposed sale was never made, and denies any such contract.* It denies that the R. F. Paper Co. ever became the owner of twenty-four-thirtieths, but avers that six-thirtieths always belonged to the Sulphite Co., nine-thirtieths to itself (which it never conveyed or agreed to convey), and in addition that there is now outstanding one share in the name of Chisholm, one share in the name of Charles A. Brown, and one share in the name of Allen M. Fletcher, belonging to them respectively in their own right; that *the letter written by Chisholm as president of the Otis Falls Co., December 22, 1898, states the truth, and that the Otis Falls Co. is not bound to deliver the stock.*

April 6. Meeting of Supply Co. called by Snow for April 7, at ten o'clock. (Emery, *p.* 806, Int. 156, *et seq.*)

1899.

April 7. At the meeting Emery filed protest (II Rec., *p.* 810) reciting the situation and the facts therein set out and his objections to any meeting being held pending the determination of the bill in equity brought to compel Chisholm and the Otis Falls Co. to tranfer the 721 shares of Supply Co. stock and the injunction restraining them from voting on the same. (Emery, Int. 156.)

June 26. Decree of the supreme court of Maine in the bill in equity of January 7, 1899, to which the foregoing answers were filed March 30, 1899, that, upon the payments of the amounts which Emery had for nearly a year been trying to pay, the Otis Falls Co. and Chisholm are "*hereby ordered to execute and deliver to the said Rumford Falls Paper Company a transfer of their respective interests in said Androscoggin Timber Supply Company and all interests which they or either of them have in said timber lands, including one share of the capital stock of said Androscoggin Timber Supply Company standing in the name of Charles A. Brown, as prayed for in the bill.*"

June 29. Entry in the bill in equity case, "Decree satisfied."

June 29. (Burbank's Dep., *p.* 54, Int. 229.) Letter from Emery, president of R. F. Paper Co. to I. P. Co., as follows:

"Through a decree filed in the Supreme Judicial Court the 27th inst., *we have obtained possession* of the certificates of Androscoggin Timber Supply Company's stock held by the Otis Falls Pulp Company, Charles J. (A.) Brown and H. J. Chisholm, and now hold 1,924 shares out of a total issue of 2,405.

"We have also called and paid all notes given George Van Dyke by the Umbagog Pulp Company, Rumford Falls Power Co., Otis Falls Pulp Company and ourselves, so that we now own four-fifths of the Androscoggin Timber Supply Company free and clear.

"Please advise us as to your wishes."

The R. F. Paper Co. and Emery at no time after February, 1899, or after the notice of January 13, had any intention of carrying out the contract of January 31, 1898, which the I. P. Co., by Burbank's letter of January 13, 1899, *had terminated and repudiated on the date of February 1, 1899.*

(Emery, Ints. 153, 154, II Rec., *p.* 805.)

1899.

July 26. First suit by College against I. P. Co. returnable at New Hampshire supreme court, at the September term for Coös County; also notice to take depositions. (This suit was discontinued before commencing the present action.)

Aug. 2. (Burbank's Dep., *p.* 55, Int. 230.) Letter of F. B. Jennings, general counsel of I. P. Co., to Emery, president R. F. Paper Co., as follows:

"Mr. Burbank has sent me your letter of June 29th in respect to the Androscoggin Timber Supply Company.

"If, as I understand from your letter, you have now cleared up the four-fifths interest in that company which you formerly agreed to sell to the International Paper Company, I would suggest that you meet me here next week, Tuesday or Wednesday, if you can conveniently do so, *and let us see if we cannot arrange for carrying out the old agreement.* I expect to leave the latter part of next week, to be absent for several weeks on my vacation, and would like to have this matter fixed up before I go, if possible."

Plainly then Jennings understood that the agreement of January 31, 1898, had been abrogated and that some new arrangement must be agreed upon before it could be carried out.

Aug. 4. (Burbank's Dep., *p.* 56, Int. 230.) Emery replied, asking Jennings to state what the I. P. Co. desired to do and that he would take up the matter promptly.

Aug. 8. (Burbank's Dep., *p.* 57, Int. 230.) Jennings replied that, before the I. P. Co. could determine what it desired to do, it would be necessary to ascertain the situation; that the I. P. Co., as he understood, was *disposed to purchase the Timber Co. stock held by Emery upon the terms originally proposed*, but *before doing so* it was necessary to be satisfied that the stock would convey the property. Jennings then suggested various other matters that might be taken up and settled together, and it was with a view to such conference and settlement that he suggested Emery's coming to New York.

1899.

Aug. 11. (Burbank's Dep., *p.* 58, Int. 230.) Emery replies to Jennings' letter of the 8th, saying, "*We do not care to revive the old agreement which the Int. Paper Company refused to consider binding after February 1st, as per their letter of January 13th*," and suggests that somebody be sent to audit the accounts between the two companies.

Aug. 16. Burbank's Dep., *p.* 60, Int. 230.) Jennings replies to Emery's letter of the 11th, saying that he has communicated the contents of Emery's letter to the I. P. Co. and that they will send some one to audit the accounts.

It is plain that, on February 1, 1899, the date of the expiration of notice in Burbank's letter of January 13, 1899, both parties understood that their respective rights under the contract of January 31, 1898, were then definitely and finally terminated, that it was not regarded by either as binding on itself or the other, *and that the I. P. Co., Chisholm, Burbank, and Jennings then definitely and conclusively knew that the I. P. Co. had no right to cut or take a stick of timber from Dartmouth College grant.*

They had known this fact for months before February 1st. The subject of the Supply Co. stock had been repeatedly under discussion. Chisholm and Jennings had been manœuvring to prevent the I. P. Co. having the stock delivered to it. Burbank knew all about the "fight," as he calls it, but he had declined to interfere. He wrote the letter of January 13, 1899. *They had kept their trespasses secret.*

When Perkins went to Burbank's office, November 26, 1898, and told him in substance that, if he could not persuade Chisholm as president of the Otis Falls to let the Supply Co. stock be transferred so that delivery could be made, they would have to take legal action and forbid the cutting of any timber from the lands, Burbank, whose men were at that moment cutting the timber on the Grant *was silent on that point and let Perkins go away without a suspicion of what he was doing.*

Good faith demanded that Burbank then tell Perkins the truth about their trespass.

When Perkins conferred with Jennings January 31, 1899, to urge that the president of the I. P. Co., in his capacity as president of the Otis Falls Co., turn over the 720 shares of stock, so that the R. F. Paper Co. could perform its contract and deliver to the I. P. Co., and Jennings told him that "*it was immaterial whether they had it or not, that they had paid about twice as much as the property was worth any way*," and that the extended time would expire about February 1st, *he made no intimation that they were cutting upon the Grant, and let Perkins go away without the slightest suspicion that they were with one hand pushing away the only basis for a pretence of right which they could have for operating and with the other driving nearly twelve million feet of timber from the College Grant.*

Good faith demanded that Jennings then tell Perkins the truth about their trespass.

Knowing these facts and receiving the letter of February 10, denouncing them as trespassers and absolutely forbidding the removal from the premises of any part of the lumber which had been cut, and without making any investigation with reference to the right to cut (Burbank's Dep., Int. 245), they told Thomas to go ahead, clean the logs from the Grant and drive them out (Thomas' Dep., Int. 114).

I.

Contract January 31, 1898, by R. F. Paper Co., to Deliver 1920 Shares in Supply Co. to Defendant.

The defendant company was organized in January, 1898. It bought various properties, including the mills of the Rumford Falls Paper Co. That company then owned and had in its possession its original 12-30 (960 shares) of the Supply Company stock and the 2-30 (160 shares) originally issued to the Rumford Falls Power Co., making 1,120 shares. Under the contracts made in May, 1893, it was entitled to the 1-30 (80 shares) from the Umbagog Pulp Co., and the 9-30 (720 shares) from the Otis Falls Pulp Co. The 80 shares of the Umbagog Pulp Co. were soon transferred to it, making 1,200 shares in its actual possession.

It was then entitled to the Otis Falls Pulp Co.'s 9-30 (720 shares), but Chisholm, then vice-president of the defendant, was president of the Otis Falls Co. The defendant, during the spring of 1898, bought the Sulphite Co.'s stock, 6-30 (480 shares).

By the agreement of January 31, 1898 (II Record, *p.* 189), the Rumford Falls Paper Co. agreed to sell to the defendant all the stock which it then held in the Supply Co. (1,120 shares) and, relying on the Otis Falls and Umbagog agreements of May, 1893, to acquire and transfer the 800 additional shares (Otis, 720; Umbagog, 80) and to transfer all the same, to wit, 1,920 shares, to the defendant.

Such was the contract.

If the defendant's president, Mr. Chisholm, had not wilfully rendered impossible the transfer of the Rumford Falls Paper Co.'s stock in the Supply Co. (1,920 shares) to the defendant in accordance with the contract, the defendant would have become owner of the entire capital stock of the Supply Co., namely, the 480 shares which it bought of the Sulphite Co. and the 1,920 shares contemplated by the agreement of January 31, 1898.

If the defendant had become sole stockholder of the Supply Co., it might have operated on the Grant under the lease without objection from anybody *but the College.* But owning only 480 shares out of 2,400, it would have no more right to take timber

from the Grant than a stockholder in a railroad would have to appropriate the railroad's wood or coal beside the railway tracks. As such stockholder, its legal rights were wholly governed by the constitution and by-laws of the corporation, and the general law relating to stockholders.

II.

CHISHOLM, PRESIDENT OF THE DEFENDANT COMPANY, WILFULLY PREVENTED THE TRANSFER TO THE DEFENDANT OF THE 1,920 SHARES IN THE SUPPLY COMPANY.

He was aided by Mr. Jennings, defendant's general counsel, who also acted as personal counsel for Chisholm. (Perkins, II Record, *p.* 864, Int. 42.) He was president of Otis Falls Co. (Chisholm's Dep., *p.* 101, Int. 79), and a large owner in that company (Chisholm's Dep., *p.* 91, Int. 43).

Emery (R. F. Paper Co.), about October 31, 1898, through Perkins, made a suggestion to Burbank about the notes payable under the contract of January 31. (Burbank's Dep., *p.* 49, Int. 224.) Burbank replied that the proposition involved a settlement with the Otis Falls Co., *for which he was not empowered to act* (Burbank's Dep., *p.* 50, Int. 225) *and said that the settlement proposed by Emery would probably not be accepted by Otis Falls Co.* (*Ib.*) Chisholm had returned from Europe about the middle of October. (Chisholm's Dep., *p.* 159, Cross Int. 33.) Emery wrote Burbank again, November 3, 1898 (Burbank's Dep., *p.* 51, Int. 226). Refers to the original agreement of 1893 of Otis Falls Co., to turn over its 720 shares of stock; said that he had paid all the notes and desired to have the matter fixed up. Emery was trying to have Burbank aid him in getting Chisholm, president of Otis Falls Co., perform his agreement and deliver the 720 shares of Supply Co. stock, so that Emery could deliver said shares to the defendant under the contract of January 31, 1898.

On November 5, 1898, Burbank replied that it had been impossible to arrange anything until after Chisholm returned from Europe, and "*as soon as Mr. Chisholm returned, I brought the matter to his attention*," and said that he would speak to him about the matter again to-day. (Burbank's Dep., *p.* 19, Int. 81.) This

effort of Burbank, the vice-president, to have Chisholm perform the said agreement was a lamentable failure. He says he brought the matter to Mr. Chisholm's attention *but does not remember what he said.* (Burbank's Dep., *pp.* 20, 21, Ints. 84–85.) When this matter was brought to Chisholm's attention early in November, why did he not as president of the Otis Falls Co. turn over the 720 shares, according to the agreement?

There was a quarrel between Chisholm and Emery. (Burbank's Dep., *p.* 22, Int. 93.) It had not recently arisen, for Burbank declined, as he had *several other times*, to be drawn into that fight. (Burbank's Dep., *p.* 21, Int. 88.) Then the R. F. Paper Co. tried again to persuade Chisholm to let the Otis Falls agreement be performed, and on November 26, 1898, sent Perkins, a director, to persuade Burbank to interfere and induce Chisholm to turn over the 720 shares of stock. (Perkins, II Record, *p.* 858, Int. 14.)

The conference with Burbank is set out at length in the letter which Perkins wrote to Emery, November 29, 1898. (Perkins, II Record, *p.* 876.) Spent two hours with Burbank. Went over the whole matter. *Burbank understood it fully.* The sole purpose of this conference was to have Burbank persuade Chisholm (see letter), but Burbank hesitated and finally said *there were some personal matters between Mr. Chisholm and Mr. Emery which he was not going to interfere with.* (Perkins, II Record, *p.* 860, Int. 23.) In this same conference Perkins told Burbank distinctly that if the R. F. Paper Co. could not get that stock and make a tender, they certainly would not permit them to cut on the woodlands (Perkins, II Record, *p.* 859, Int. 16), to which Burbank replied, "I do not see how you can do anything else." (Perkins, *p.* 859, Int. 21.)

Again I ask, Why was Chisholm preventing the delivery of that 720 shares, and why did not Burbank, who would not assume the responsibility of interfering to that end, tell Perkins that the defendant was cutting 13,000,000 feet of timber from the Grant, when its president, with the knowledge of the vice-president, was preventing the defendant from acquiring a basis for claiming the right to cut?

Then the R. F. Paper Co. became discouraged at their efforts to persuade Chisholm, and decided that they must fight to compel him to do as he agreed, and, as Perkins says in the letter of November 29, "*If we must fight, why, let us proceed at once.*"

Burbank knew the whole situation.

But he did not stop the cutting.

And he did not tell that they were cutting.

Besides the Otis Falls notes to Van Dyke, the R. F. Paper Co. were to pay the original cash disbursements of the Otis Falls Co. (Emery, *p.* 789, Int. 96.) But he could not get a statement of the amount. He asked two or three times, but the Otis Falls Co. would not send it. (Emery, *p.* 790, Ints. 99, 102.) Emery had figured the approximate amount from his own books (Emery, *p.* 790, Int. 104) and, on November 3, had written about it to Burbank (Burbank's Dep., *p.* 52), but he could not get a statement of the Otis Falls Co.'s claim.

Why not?

Emery wanted to pay.

Why would not they tell him the amount?

I submit that the sole reason was Chisholm's desire to prevent the transfer of the 720 shares by the Otis Falls Co., and thereby prevent the transfer of the 1,920 shares to the defendant.

Then Emery, on December 21, wrote the Otis Falls Pulp Co., demanding a statement of the amount paid—the cash disbursements—and said that they were prepared to pay the same and should then expect a delivery of the 720 shares. (Chisholm's Dep., *p.* 124, Int. 171.) Then Chisholm, as president of the Otis Falls Co., wrote the letter of December 22, 1898 (Burbank's Dep., *p.* 23), notifying the R. F. Paper Co. with reference to the agreement of 1893 to transfer the 720 shares of stock, that "*we no longer consider the arrangement as in force and decline to revive or carry out the same.*" This letter was signed by "Hugh J. Chisholm, President," Otis Falls Co., but he was then president of the defendant company, and if in his first capacity he could avoid delivering the 720 shares to the R. F. Paper Co., he could, in his second capacity, prevent the delivery of the 1,920 shares to the

defendant. Can there be any reasonable doubt of Chisholm's purpose to prevent the defendant from acquiring title to the Supply Co.'s stock? The R. F. Paper Co. was trying to perform its agreement of January 31, 1898, with the defendant, but the defendant's president was using his power to prevent it.

Why?

Then Emery's demands became more emphatic and, on December 28, he replied to Chisholm's letter of the 22d (see *supra*, *p.* 24) that Chisholm's position was untenable, both at equity and in law, and demanding that he name the sum to which the Otis Co. were entitled for cash disbursements, telling him that he had several times before requested him to name the amount, and, although Chisholm had promised, he had failed to comply, "*and we now demand the same of you without further delay or subterfuge.*" Emery then notified him that if he further failed, the R. F. Paper Co. would take steps to enforce the carrying out of the contract by Chisholm, theirs having been faithfully performed.

To this demand and notice, Chisholm, as president of the Otis Falls Co., made no reply.

Why not?

Chisholm's next step, January 7, was to have his counsel, Snow, call the annual meeting of the Supply Co. for January 18, 1899.

Why?

There was nothing to be done.

No such meeting had been held since 1893.

But by a combination of circumstances, if that meeting could have been held, Chisholm would have actually controlled a majority of the stock. (*Supra*, *p.* 25.)

What could he have done about abrogating the contract of January 31?

He could have elected directors of the Supply Co., who might coöperate with him in his attempt to prevent the defendant from having the Supply Co's stock delivered to it. But the R. F. Paper Co. were trying to carry out the agreement of January 31,

1898, with the defendant, and to avoid the attempt of the defendant's president to prevent the carrying out of that agreement.

On the same day, January 7, 1899, the R. F. Paper Co. filed a bill in equity, against the Otis Falls Co. and Chisholm, setting out all the facts relating to the 721 shares, praying for specific performance, and asking an injunction against the two defendants from voting on the stock or granting to anyone the right to operate on or in any way interfere with the timber lands set out in said bill, and from all attempts directly or indirectly to accomplish such object. At this time the R. F. Paper Co. had no suspicion that Chisholm's other company, the defendant, were cutting down 13,000,000 feet of timber on the College Grant. The injunction and bill were personally served on Chisholm as president of the Otis Falls Co., in New York city, on January 13.

On the same day and presumably after the service of the injunction, the defendant's vice-president, Burbank, wrote the letter of January 13 to the R. F. Paper Co., notifying the latter that if the agreement of January 31, 1898, to deliver the 1,920 shares of Supply Co.'s stock, was not carried out on or before the first day of February, 1899, in all respects, *the defendant would regard the agreement as terminated, and would refuse to complete the purchase after that date.* (For a discussion of this letter, see *supra*, *p.* 26.)

January 16, 1898, Emery (R. F. Paper Co.) replied to the letter of January 13 about the agreement of January 31, 1898, and told Burbank they had used every possible effort to carry it out, and that their *failure was due solely to Mr. Chisholm's action.* (See *supra*, *p.* 27.)

They at once sent Mr. Snow to Emery's house to ask Emery to go to New York to see Jennings, the general counsel of the defendant and the personal counsel of Chisholm, and Perkins called on Jennings and tried to persuade him to have his client Chisholm consent to the delivery of the 721 shares, and Jennings in substance told him that *it was quite immaterial to the defendant whether it had the Supply's Co's stock or not, that the time for delivery would be out February 1, and that they had paid twice as*

much as the property was worth anyway. (For a discussion of Perkins' conference with Jennings, see *supra*, *p.* 28.)

Then followed the discovery of the defendant's trespasses, the notice of February 10, the answers to the bill in equity, filed March 30, 1899, in which Chisholm and his company, the Otis Falls Co., still persisted in their denial of the right of the Supply Co. to the 720 shares of stock, and these answers were followed by decree of the supreme court of Maine, June 26, 1899, ordering Chisholm and the Otis Falls Co. to transfer the 721 shares to the Supply Co., as they had agreed to do six years before; and they then transferred the 721 shares.

Why did this defendant seek to avoid acquiring the 1,920 shares of stock in the Supply Co., which would have enabled them to cut on the College Grant without objection from anybody except the College?

The answer is clear.

The president of the defendant company, Hugh J. Chisholm, with the coöperation of its general counsel, Mr. Jennings, acting as Chisholm's personal counsel, and with the full knowledge of the vice-president, Mr. Burbank, who declined to interfere, was the sole cause of the non-delivery of the Supply Co.'s stock.

They and they alone were responsible.

For months the R. F. Paper Co. had tried to induce the defendant to take the shares of stock which would have given the defendants an equitable right or an equitable excuse for cutting, *if they had complied with the terms of the lease*, but the president of the defendant company succeeded in thwarting this effort.

Why?

Because, we submit, that he had had a personal quarrel with Emery, and because as defendant's president he thought, in the contract of January 31, 1898, the defendant had agreed to pay, as his counsel, Jennings, has told the court, "*about twice as much as the property was worth anyway.*" (Perkins, *p.* 866, Int. 51.)

III.

Responsibility for Defendant's Wilful Trespass Rests on its Officers—Mr. Chisholm, President; Mr. Burbank, Vice-President and Manager Woodlands Department; Mr. Thomas, Division Superintendent; and Mr. Jennings, General Counsel.

Their responsibility differs, but each took part in the transaction at different times before the timber was removed, and each knew that the defendant was cutting or taking away timber to which it had no shadow of legal right. Let us examine the parts which they respectively play.

(1) Mr. Chisholm, President.

Mr. Chisholm declined to state that the operations were not authorized by him nor known to him (Chisholm's Dep., *pp.* 116, 117, Ints. 144–146), but the gist of his testimony is to the effect that he did not consider the subject until Burbank conferred with him just after the letter of February 10, 1899, was received. (Ints. 205, 214–218.) Mr. Chisholm's statements on this point are almost incredible. His memory seems to be seriously impaired, except when refreshed by written documents—so seriously that it must excite the apprehension of his friends and business associates. Following is some of the evidence of the extreme frailty of Mr. Chisholm's memory:

> He cannot remember whether the assignment of the Van Dyke lease and the guaranty of the five companies in which he was an officer, that the provisions of the lease should be performed, were ever examined by the directors (Int. 36) or whether they were read to the directors (Int. 37), notwithstanding the record shows the fact (Ints. 52, 53); nor how much cash the Sulphite Co. furnished (Int. 39), nor how much of the Otis Falls Co. he then owned (Int. 44), nor any of the provisions of the Van Dyke lease except the $1.25 a thousand (Int. 54); nor whether he acted upon the ques-

tion whether the Van Dyke lease should be spread on the records of the company (Int. 57), nor the votes which were passed at the meeting (Int. 58), nor whether those votes were passed before June, 1893 (Int. 70); nor how many shares the Otis Falls Co. held in the Androscoggin Co., of which he was trying to prevent the delivery (Ints. 80–81); nor whether an injunction was issued against him and the Otis Falls Co. restraining him from voting on the 721 shares (Int. 91), nor whether the injunction was served on him in New York on or about January 13, 1899 (Int. 92), nor whether he ever had notice of such injunction (Int. 93), nor whether he contested in the Maine courts the bill in equity of January 7, 1899 (Ints. 107, 108), nor what was the decree of the Maine supreme court on that bill (Int. 110); nor whether he asked Snow to issue the call on January 7, 1899, for the meeting of January 18, 1899 (Int. 112), nor whether he wrote a letter to Snow, suggesting that he call such a meeting (Int. 113), nor whether he asked Snow to call a directors' meeting of April 7 (Int. 115); nor when he first knew that operations on the College Grant by the I. P. Co. were contemplated or being carried on (Int. 116), nor when such operations were started or finished (Int. 119), nor whether his first knowledge of such operations was before or after January 1, 1899 (Int. 121), nor whether he had any knowledge of those operations when he wrote the letter of December 22, 1898 (Int. 122), nor whether he knew in November, 1898, that the I. P. Co. were going to operate on the Grant the following winter (Int. 123), nor from whom he received the first information that the operations by the I. P. Co. on the Grant were contemplated (Int. 124), nor from whom he received the first information that such operations were being carried on in behalf of the I. P. Co. (Int. 125), nor whether at any time during the winter of 1898–'99 the I. P. Co. were cutting timber off the College Grant (Int. 124); and that he has no record or correspondence enabling

him to answer some of the foregoing questions (Int. 136), nor whether Burbank said anything prior to January, 1899, leading him to suspect that the I. P. Co. was cutting timber on the Grant (Int. 139); *that he won't say that the operations were not authorized by him or known to him because he does not remember when he first learned of them* (Ints. 144–146), and that he has no other data or source of information to refresh his recollection (Int. 155); that he does not remember whether Burbank conferred with him in November, 1898, about the failure of the R. F. Paper Co. to transfer the stock (Int. 157), that he has no recollection of ever seeing the letter from Emery to Burbank of November 3, 1898 (Int. 158), and can't recall any conversation that he had with Burbank about it or any of the facts contained in it (Int. 159); that he has no recollection of Burbank's letter of November 5 to Emery (Int. 160), that he doesn't remember Burbank's bringing to his attention the matter of transferring the O. F. Co. stock on his return from Europe, notwithstanding the fact that Burbank told Emery in the letter of November 5 that he had done so (Int. 161); that with reference to Burbank's promise to Emery in the same letter that he would speak to Chisholm about the matter again to-day, he can't remember whether Burbank did or not (Int. 163).

The statement in the letter is, "As soon as Mr. Chisholm returned, I brought the matter to his attention." But Mr. Chisholm and Mr. Burbank think that statement means that he brought the matter to the attention of Mr. Denison, not Chisholm (Ints. 165–169). By referring to the letter, the master will perceive that this construction is absurd.

He can't remember whether he was consulted about Burbank's letter of January 13, 1899, abrogating the contract of January 31, 1898 (Int. 174), nor whether he then authorized or approved the sending of that letter (Int. 175), and can't remember about the letter (Int. 177), and can't remember the circumstances that called for the sending of the letter (Int.

178), and can't remember whether Burbank conferred with him about Emery's letter of January 16, 1899 (Int. 179), and can't remember whether he ever saw the letter (Int. 180), nor whether he knew in January, 1899, that Emery was claiming that he (Chisholm) was undertaking to delay the performance of the contract of January 31, 1898 (Int. 181); nor whether the R. F. Paper Co., in February, 1899, claimed that he personally tried to prevent the transfer of the Androscoggin stock to the I. P. Co. (Int. 184), nor whether he had notice of that charge from anybody (Int. 186), nor whether he authorized Burbank's sending the notice of January 13 (Int. 187), *nor whether he said in 1899 that the I. P. Co. had agreed to pay more than the value of the Androscoggin stock* (Int. 188). *He says he may have made that statement but he does n't now recall to whom or how or when* (Int. 189). He does n't remember ever being called upon by Emery to deliver the share of stock (Int. 194), *nor whether he, in January, 1899, retained Jennings as his personal counsel with reference to the transfer of the Supply stock in the name of the Otis Falls Co. and his one share of stock* (Int. 195), *and he could n't tell whether he employed Jennings as counsel until he should ask him* (Int. 198). He does n't remember giving Burbank any special instructions after receiving the letter of February 10 (Int. 207).

With reference to the charge in the letter of February 10, that the operations had been conducted to injure seriously the value of the property, Chisholm does n't remember whether he advised Burbank to make an investigation (Int. 226). He can't remember whether he advised Burbank with reference to the charge that the Paper Co. were trespassers (Int. 227). *He does not remember giving Burbank any advice or making any suggestions of what should be done in response to the letter of February 10* (Int. 232).

In view of Mr. Chisholm's statements that he knew nothing about this cutting until the letter of February 10, when the trees

had all been cut down and were piled on the banks of the streams, *his assertions of innocence prior to that time and his reasoning about the right of the I. P. Co. to cut, would seem to be immaterial.* The mischief had then been done and, as he says, without his knowledge.

His attention being first arrested by the conference with Burbank over the letter of February 10, notifying the I. P. Co. that they were trespassers and forbidding them to remove the timber, he says he took no personal responsibility on the question of what should be done but *referred everything to Burbank* (Int. 231), *and the question of whether the operations should be completed and the timber which was already cut be removed from the Grant, notwithstanding the letter of February 10, was left to Mr. Burbank with full authority* (Int. 233).

How could Chisholm, the defendant's president, who, on February 10, 1899, was fully informed of the entire facts from all points of view, unload the responsibility on Mr. Burbank—whom Chisholm says was put in charge of about four thousand square miles of land, equivalent to a tract four miles wide stretching from New York to Chicago (Cross Int. 25, *p.* 156), without any previous knowledge or experience in the business of timber operations (Cross Int. 26, *p.* 156), and whose appointment in charge of the timber land department was "*merely temporary until*," as Chisholm says, "*we could find the right man to put in the place?*" Chisholm knew that Burbank was practically ignorant of the practical management of that department and that he was forced to depend on the subordinates selected by him, to a large extent. (Cross Int. 28, *p.* 167.)

At that moment, Chisholm, personally, and the Otis Falls Paper Co. were under an injunction from the Maine supreme court from *granting to any one the right to operate on or in any way interfere with the College lands and from all attempts, directly or indirectly, to accomplish such objects.*

He then knew that the defendant company, of which he was president, by the letter of January 13, which he must have author-

ized, had backed out of and declined to perform the agreement of January 31, 1898, and that the defendant was not to have the 1,920 shares of the Supply Company stock.

He then knew that he had used every means in his power since his return from Europe, in October, 1898, to prevent that stock from being delivered to the defendant.

He had disclosed his purpose to prevent the delivery of that stock in the letter of December 22, 1898, signed by his own hand. *To aid him in preventing such delivery to the defendant, he had used the services of the defendant's general counsel, Mr. Jennings.*

He was shown the letter of February 10, which had been submitted to him and Jennings. He was thereby told that the operations had been carried on without the knowledge or permission, and against the interests of the Supply Co. and the Rumford Falls Paper Co., the owner of four fifths of the stock. It was therein charged that he, as defendant's president, had prevented the defendant from getting title to the stock. He was told that a large amount of timber had been cut and the operations conducted so as seriously to injure the value of the property. He was notified that the operations were without authority, that the defendant was a mere trespasser and would be held strictly accountable for the damage which had been done, and that the defendant company was absolutely forbidden to remove from the premises any part of the lumber which had been cut.

He knew that these lands were subject to the Dartmouth College lease. He admits that he knew that the Sulphite Company, whose 480 shares of stock the defendant had bought, had guaranteed the performance of every covenant of the Dartmouth College lease, and was individually responsible for the performance of those covenants. (Dep., *p.* 87, Ints. 30–32.) As treasurer of the Sulphite Company, he had personally executed the contract that all the covenants in that lease should be performed. (Dep., *p.* 84, Int. 25.)

If he did not in fact then act upon that knowledge and examine the covenants of the lease, why did he not do so? His company

(the defendant) had then violated thirteen separate covenants of the lease (*supra*, *p.* 11). One of those covenants provided that payment should be made each year before the timber should be removed from the Grant and another that *the title to the timber should remain in the college until said annual payment should be made.*

If his memory was not in the last stages of exhaustion, he must have known that the title to the timber which his company had cut was in Dartmouth College, or, at any rate, he must have had such flickerings of remembrance that he would have mentioned the lease to the general counsel, Mr. Jennings.

But to the personal charges of bad faith against him and the charge of trespass against his defendant company, set out in the letter of February 10, he was deaf, and says that he left the question whether the timber cut should be removed from the Grant to Mr. Burbank, with full authority (Dep., *p.* 141, Int. 233) and gave him no advice or suggestions. (Dep., *p.* 141, Int. 232.)

Was this conduct of Chisholm's in good faith? Could he, as president of the International Paper Company, with the knowledge which he is shown to have had, with the letter of February 10 before him, and in conference with the defendant's general counsel, relieve himself and his company of the charge of bad faith by saying that he left the decision to a subordinate whom he admits had no previous knowledge or experience in timber operations, who was not the right man for the place, and who had been appointed only as a temporary expedient until the right man should be found? (Dep., *p.* 156, Ints. 26, 27.)

If Chisholm did not know of the unlawful entry and the first part of the unlawful cutting, he did know of the unlawful removal of the timber from the Grant. He connived at that, he pretended to shut his eyes to it; but we submit that the defendant cannot escape from the just and legal consequences of its wilful taking of 12,000,000 feet of College timber because its president wilfully shut his eyes to and connived at the operation.

It is Mr. Chisholm's duty to be frank. He has left the following questions unanswered. They are important.

Why did Chisholm say he left the decision to Burbank and not to Mr. Jennings, the counsel?

If he was acting in good faith, why is he now silent as to Jennings' advice?

What advice did Mr. Jennings give him?

(2) Mr. Burbank, Vice-President and Manager Department of Woodlands.

Was manager Department of Woodlands, March 4, 1898, to April 26, 1899; was second vice-president from February 4, 1898, to August 24, 1898; was first vice-president from August 24, 1898, to June 26, 1901, and has been treasurer ever since March 29, 1899. (Burbank's Dep., *p.* 4, Int. 7.)

As manager of Department of Woodlands, he had charge of the land, but only in a general way, as his knowledge of such matters was *very slight.* (*P.* 4, Int 8.) He was without previous knowledge or experience in timber operations. His appointment in charge of the timber lands was temporary, and only until the defendant could find the *right man* to put in his place (Chisholm's Dep., *pp.* 156–7, Cross Ints. 26–7), and the defendant knew that, because of his practical ignorance, he would be forced to depend upon his subordinates to a large extent. (Chisholm's Dep., *p.* 157, Cross Int. 28.)

Mr. Burbank was not to be criticized personally for his inexperience nor because he was the *wrong* man. He knew it. He makes no pretences that he was the *right* man. Chisholm tries to unload responsibility on Burbank, and he staggers along under it as well as he can and, it may be, as well as we should expect of such a man in like circumstances, who by nature prefers to be fair but is heavily weighted by his superiors.

Burbank says he gave Thomas directions to operate on the College lands for the International Paper Co. (Dep., *p.* 5, Ints. 9,

10.) The date was August 5, 1898 (Thomas' Dep., *p.* 12, Int. 46), while riding from Errol to Berlin (Thomas' Dep., *p.* 9, Int. 29).

On the twenty-first of October, 1902, Burbank testified that he gave those directions because he supposed they owned the land (*p.* 5, Int. 13), that when they purchased the different properties, they bought from the Rumford Falls Paper Co. a portion of the stock of the Supply Co. (1,920 shares by the contract of Jan. 31, 1898, not delivered), and they also bought from the Rumford Falls Sulphite Co. its stock in the Supply Co. (480 shares), and that gave them complete ownership of the stock of the said company; and he says he understood the ownership of that stock carried the ownership of the land (*pp.* 5, 6, Ints. 14, 15), and that he supposed that the Supply Co. absolutely owned the property (*p.* 6, Int. 17).

But analyzing his knowledge and suppositions, Mr. Burbank admits that he got that idea only from the general talk they were having at the time the timber lands were talked over (*p.* 6, Int. 18), that he had no recollection of any particular conversation on the subject of ownership (*p.* 7, Int. 20); he was unable to give the name of any person from whom he got the idea in 1898 that the Supply Co. owned the Grant (*p.* 7, Int. 21); that he made no investigation of the ownership before telling Thomas to operate (*p.* 7, Int. 22); that he never examined any papers to ascertain whether the Supply Co. owned the Grant (*p.* 7, Int. 23); that he asked nobody about the ownership of the Grant in 1898 (*p.* 7, Int. 24); and he doesn't remember that anything was said by anybody in 1898 to the effect that the Supply Co. owned the Grant (*p.* 7, Int. 26).

He had never heard of the by-laws of the Supply Co. before January 1, 1899 (*p.* 40, Int. 174). He first read the by-law about February 10, 1899, when they got notice from Emery charging trespass (*p.* 38, Int. 161) and he read the by-laws then *because he thought he would better commence looking up something about the matter* (*p.* 39, Int. 168), and it was from the by-law

that *he then got the idea* that they had the ownership of one-fifth of the property (the 480 shares), and could cut on it independent of anyone (*p.* 39, Int. 172), but this was February 10, 1899, or after.

The foregoing is intended to be a full statement of the knowledge which Burbank had and the investigation which he made before giving the order to take the 10,000,000 or more feet of timber from the College land, and the question as to the defendant's good faith is thus presented.

Does the general assertion of the inexperienced Burbank, that he supposed the defendant would own the stock of the Supply Co., and supposed that the stock of the Supply Co. represented an ownership of the college land, afford even a pretext of justification for the entry and conversion, when that asserted general supposition was *unconfirmed* by any talk with anybody or by an *examination* of any papers or any *investigation* of the ownership before entry? May trespassers furnish a justifiable excuse for cutting and carrying away valuable timber *by the mere assertion of an unexamined, unconfirmed, and uninvestigated supposition that they had the right so to cut?*

I submit that, prior to the entry, the defendant, through Mr. Burbank, had no reasonable ground for a belief that they had the right to enter upon the College land.

But Burbank says he was basing his supposition on the complete ownership of the stock of the Supply Co. (*p.* 6, Int. 15). As early as November 1, 1898, Burbank knew that Chisholm was holding back the 720 shares of the Supply Co. stock standing in the name of the Otis Falls Co. Before November 3, he had told Perkins that he would give him an answer when Chisholm returned from Europe. On November 5, he says that he brought that matter to Mr. Chisholm's attention and that he would speak to him again about the matter to-day (see letter of November 5). He did bring the matter of transferring that 721 shares of stock to Chisholm's attention *but does not remember what he said* (*p.* 20, Ints. 84, 85).

He says he was not told of the lease, but in September, 1898, he signed a contract for cutting which contained this provision, "*Said logs to be cut according to permit given by Proprietors of said College Grant*" (Ex. 1 Chisholm's Dep., Int. 170.)

Is he not stopped from now saying he did not then know?

Burbank says that he declined as he had at several other times to be drawn into that fight (*p.* 21, Int. 88). He then knew there was a fight between Chisholm and Emery, representing the two companies (*p.* 22, Int. 93), and that that was the reason for the Rumford Falls Paper Co. not getting the 720 shares of Otis Falls Co. stock in the Supply Co. and not delivering the 1,920 shares to the defendant under the agreement of January 31, 1898.

Burbank's attention was again directed to this in the conference which Perkins had with him, November 26, 1898, when he told Perkins that there were some personal matters between Chisholm and Emery that he was not going to interfere with; and, when Perkins told Burbank that they must notify the I. P. Co. that they must cut no timber on the land, Burbank replied, "*I do not see what else you can do*," and at the same time kept silence as to the the defendant's operations on the land.

Burbank appears to have been fully informed from time to time of the failure of the Rumford Falls Paper Co. to get the stock to deliver to the defendant, and when he wrote the letter of January 13, 1899, and notified Emery that unless the agreement of January 31, 1898, was carried out on or before the first day of February, 1899, "*in all respects*," the defendant would regard the agreement as terminated and would refuse to complete said purchase after said date, *he knew that agreement could not be carried out, because Chisholm was preventing it*, and he then definitely and absolutely knew that the defendant was not to have the 1,920 shares of stock and therefore was not to have even his original suppositious right to cut on the college land.

Notwithstanding Burbank's knowledge of the defendant's failure to acquire even the suppositious right to cut, he kept on cutting.

It was about or just before February 10, 1898, that he thought he would better commence looking up something about the matter (*p.* 39, Int. 168) and got the by-laws and found that this afforded no justification for the entry and cutting. Then he received the letter of February 10 (*supra*, *p.* 30), charging in no uncertain terms that they were trespassers and forbidding him to remove the timber from the Grant.

This letter demanded quick and definite action.

Eleven and one half million feet of college timber cut by defendant then lay on the banks of the streams ready for removal.

He was now told that the defendant was a trespasser. He was forbidden to remove the timber. He was notified that the defendant would be held "strictly accountable." What did he do?

He first went to Mr. Chisholm. He referred this letter to Mr. Jennings as counsel. He does not remember what Chisholm said. He does not remember what Jennings said, or that he said anything.

He ordered the timber removed contrary to the advice of counsel. (See *infra.*) He was bound to take and act on such advice.

Again I ask, *What did Mr. Jennings advise, and why have they not disclosed that advice?*

Under these circumstances, upon what fact can the defendant's counsel or the master base the good faith of Mr. Burbank?

He knew August 5, 1898, that the defendant had no legal right to cut, but says he expected to acquire the right by getting the 1,920 shares.

He knew that the stock was not acquired.

He wrote the letter of January 13, 1899, notifying Emery that the defendant would not take the stock after February 1.

He knew that the only assumption on which he expected to base a claim of right had failed. Again I ask, was this good faith?

(3) Mr. Thomas, Division Superintendent.

Thomas was the practical man in charge. He was the "*subordinate*" on whom the defendant knew that Burbank would "*be forced to depend*" (Chisholm's Dep., *p.* 157, Cross Int. 28).

What Thomas knew and did not know, August 5, 1898, is important—perhaps vital.

He knew of the college lease to Van Dyke when it was made in 1888 (Thomas' Dep., *p.* 6, Int. 15), considered taking a job for Van Dyke under that lease, went on Grant to look it over and concluded not to take job (*Ib.*), knew, in a general way, about the lease all the while, knew they were cutting there under a lease "*as it was talked by everybody*" (*p.* 7, Int. 20), *that such was the general understanding all through that country* (Int. 22), and that all the men operating in that country knew generally that Van Dyke had a lease of the College Grant for cutting timber (*p.* 8, Int. 23). He prepared the contract with operator Wilson (*p.* 13, Int. 55), and put in following condition: "*Said logs to be cut according to permit given by Proprietors of said College Grant.*" (Exhibit 1, Chisholm's Dep., *p.* 170; Thomas' Dep., *p.* 13, Int. 56.)

He then intended that the operation should be carried on according to that permit or lease (*p.* 14, Int. 57) so that the logs should be cut "*according to the permit given by the landowners.*" He knew that Dartmouth College was the owner of the land. (*p.* 15, Int. 62.) He then intended (he says) that the cutting should be in conformnity to the lease to Van Dyke (*p.* 16, Ints. 66, 67; *p.* 27, Int. 117).

He did not know that the lease was ever transferred to the Supply Co. (*p.* 43, Cross Int. 192) but understood the R. F. Paper Co. had been operating on the Grant *under the Van Dyke lease* ever since the Rumford mill was built, some three years. (Ints. 193–197.)

He understood his jobbers had operated under the lease, and thought they knew more about its terms than he did (*p.* 18, Ints. 78, 79; *p.* 46; Cross Ints. 203–207).

He did not know that the Supply Co. had or claimed to have any interest in the Grant (*p.* 59, Int. 271), or that there was any relation between the R. F. Paper Co. and the Supply Co. (*p.* 60, Int. 272), *and had no idea that the R. F. Paper Co. owned any*

stock in the Supply Co. (*p.* 60, Int. 273), and learned nothing about that fact "*until after the logs had been removed from the Grant*" (*p.* 60, Int. 274), and did not know by what arrangement with Van Dyke or the college the R. F. Paper Co. had been cutting for two or three years (*p.* 61, Int. 278), and did not know but Van Dyke still held the college lease (Int. 281), *and did not know but the R. F. Paper Co. had been cutting by some arrangement with Van Dyke or the college trustees* (*p.* 62, Int. 283); but upon final re-cross examination (*p.* 63, Int. 289) says he had an understanding that they (R. F. Paper Co.) were cutting under a lease that had been transferred from Van Dyke *to the Rumford Falls Paper Co.*, but he had not been told by anybody that the lease had been so transferred (*p.* 63, Int. 290).

Thomas had no copy of lease (*p.* 17, Int. 69), did not ask for a copy (Int. 70), did not know of whom to inquire (Int. 71), cannot tell why he did not ask Burbank or Chisholm (Ints. 72, 73, 77), "*never made the slightest effort to get a copy or suggested to any one that a copy should be obtained, nor made the slightest effort to inform himself about any of the provisions of that lease*" (*p.* 22, Ints. 94, 96) *and can't tell why* (*p.* 22, Int. 95; *p.* 28, Int. 119; *p.* 29, Int. 129; *p.* 43, Int. 190) but he thought in January, 1899, he ought to have been furnished with a copy (Q. B. Davis Dep., *p.* 179, Int. 58.)

The master's attention is called to Int. 100 and the answer.

"100 Q. When you suggested to Mr. Burbank about the cutting and Mr. Burbank instructed you to cut from the College Grant, you said nothing to him about the ownership of the Grant, did you?

"Ans. *Only that I supposed that it belonged*—that the *ownership of the cut* belonged to the Rumford Falls Paper Co."

It is to be regretted that Thomas did n't complete his answer. He can now give no reason why he did n't tell Burbank that the college owned the land and about the Van Dyke lease (*p.* 23,

Ints. 101, 102; *p.* 27, Int. 116; *p.* 27, Int. 128), or why he, *as Division Superintendent of the defendant, knowing of the existence of the Dartmouth College lease for ten years, and that the college owned the land, cut and carried off more than ten million feet of lumber from the College Grant without suggesting to Mr. Burbank or Mr. Chisholm anything about that lease, or making the slightest effort to ascertain the terms of the lease, or to get a copy of it, or to notify the trustees of Dartmouth College what he was doing* (*p.* 43, Int. 190; *p.* 35, Ints. 153, 154).

What a pity!

A fair, reasonable explanation of these points would be helpful.

Knowing about the lease, intending as he says to conform to it, contracting in writing with his operators that they should observe its conditions (see contract with Wilson), he then paid no attention to any of its provisions (*p.* 19, Ints. 82, 83; *p.* 20, Ints. 87, 88; *p.* 35, Ints. 155, 156, 157, 158, 159, 160, 161). Is this evidence of good faith or bad faith?

What were Burbank's instructions to Thomas?

Mr. Thomas at first says they were riding from Errol to Berlin, and "he told me to go ahead and make my arrangements to cut, etc.," (*p.* 9, Ints. 29–32). He offers to tell the talk, to which counsel objected (*p.* 9, Int. 33), but he did say that Burbank told him "*that while the Rumford Falls Paper Company's lands had not been turned over, he had no doubt they would be, and told me to go ahead and make my arrangements to cut*" (*p.* 10, Int. 40), *on the Rumford Falls Paper Company's lands* (*p.* 11, Int. 41). He does not remember that the College Grant was specifically spoken about (*p.* 57, Int. 262). Then he says they were speaking in a general way about getting timber from the lands which the Rumford Falls Paper Company were to turn over, and thinks the College Grant must have been mentioned (*p.* 58, Ints. 264–266), but he seems uncertain.

The defendant claims from the evidence that Burbank, in *August, 1898*, having a general, unexamined, uninvestigated, and unconfirmed suspicion that the R. F. Paper Co. stock in the Supply

Co. would be turned over in some undefined way which might give the defendant some rights to cut on *Rumford Falls Paper Co's. lands*, had a general talk with his Division Superintendent to get in timber from those lands, and that Thomas, who knew all the facts as shown above, concealed his knowledge from the inexperienced Burbank, and then proceeded to cut for the defendant some 13,000,000 feet of timber, to which he knew the defendant had no shadow of right. The innocent Burbank is to be made the scape-goat. Defendant's officers above him (Chisholm), below him (Thomas), and around him (Jennings) *all knew*, but Burbank didn't know (in August, 1898).

This is the one solitary fact on which the defendant hopes to float its case over the shoals.

But they are forced to admit that a little later Burbank *knew*—knew when he wrote the letters in November, when he talked with Chisholm on his return from Europe, when he had the conference with Perkins, November 26, when he wrote the letter of January 13, 1899, when he told Thomas to remove the logs after the letter of February 10.

(4) Mr. Jennings, the General Counsel.

That Mr. Jennings is a distinguished lawyer appears from the fact that he is defendant's general counsel. That he is also a lawyer of ability is shown by the fact that he advised Chisholm and Burbank that the defendant was a trespasser and had no right to remove the lumber. The last fact was not shown in words, but it is indisputably inferred from the following evidence:

The letter of January 13, 1899, abrogating the contract of January 31, 1898, was sent by his direction, for he was consulted and advised Burbank about it (Burbank dep., *p.* 27, Int. 104).

Emery's reply under date of January 16 was referred to Jennings and the matter left with him (*Ib.*, *p.* 31, Ints. 118–125).

He at once sent for Emery to come to New York to see him (Emery, *p.* 802, Int. 140).

He reviewed the situation with Perkins, January 21. (See Perkins' testimony.)

The master will find that he was then acting as counsel for Chisholm, for it is undisputed that he so claimed.

He told Perkins

1. That the time for delivery of the 1,920 shares would expire February 1, 1898.

2. That *they* (*defendants*) *did n't care whether they had the property or not.*

3. That defendant (by contract of January 31, 1898) "*paid about twice as much as the property was worth anyway.*"

4. That the R. F. Paper Co. had broken their agreement.

The letter of February 10, 1899, *charging that defendant was a mere trespasser and forbidding the removal of the timber was referred to him* as general counsel* (Burbank, *pp.* 35–36, Ints. 142–145).

Perkins testified the day before the close of the trial. Defendant's counsel suggested to the court some delay, as they were in conference with Jennings by telephone and were to receive a letter from him in the morning. The master said if they desired a postponement to get Mr. Jennings' testimony, he should grant it. But after hearing from Mr. Jennings by telephone and letter, counsel asked no delay.

Mr. Jennings did not wish to testify before the master.

He did not come.

Under these circumstances we may regard the foregoing facts as to Mr. Jennings conclusively established.

They consulted their general counsel about the letter of February 10.

We know that he was generally informed about the situation.

It must be assumed that they told him all the facts.

We know that he must have advised them.

What advice did he give?

*The letter of February 10 contained the most serious charges. A large sum of money was involved. It was important that the right step be taken. Burbank and Chisholm were at least in doubt. If they had been sure, they would not have referred the question to counsel. Having referred it, they cannot relieve themselves of the charge of bad faith without showing how they were advised and that they followed the advice.

They say repeatedly that they acted in good faith.

But what does their counsel himself say?

He is vigorously silent.

What does Burbank say his counsel said?

He says that after he turned the letter over to Jennings, "*I don't remember anything further.*" (Burbank's Dep., Int. 146, *p.* 36.)

Why does he not remember?

There can be but one answer. Mr. Jennings did not advise that they were lawfully cutting or could lawfully remove the timber cut, but did advise the contrary.

If he had advised Burbank and Chisholm that they were justified in cutting or removing, they would have held it up in this court as a shield against the charges of bad faith made by this plaintiff.

Jennings' advice, *if they acted on it*, would be urged as a justification of their acts so far as their *good faith* is concerned.

If they did not act on his advice, their bad faith is conclusively established.

That they did not follow his advice is conclusively shown by the fact that neither Burbank, Chisholm, nor Jennings can be coaxed to tell the master what that advice was. The memories of Chisholm and Burbank are unresponsive. Jennings deliberately evades taking the witness stand.

In malicious prosecution cases, advice of counsel is a common defence as proving probable cause and showing defendant's good faith. The defence here attempted is precisely the same as that of the corresponding defence in actions for malicious prosecution. In each instance the fact which defendant seeks to prove is *that he acted in good faith and on reasonable grounds.*

On *pp.* 100–103 *et seq.* (*infra*) will be found the authorities showing that the gist of this defence is not the mere fact that the defendant *consulted counsel* but the fact that he *acted in good faith on the advice of counsel.*

Reviewing the conduct of these four officers of the defendant, where is the evidence which tends to show that this defendant or its officers acted in good faith?

We submit that as a matter of law upon the undisputed facts here shown, it must be held that the defendant's original entry and cutting were without legal right or justification and without reasonable ground for believing that it had the right to cut; that after the entry it became fully informed that its acts were illegal, and that, after February 10th, it removed the timber with full knowledge and after a complete investigation and taking the advice of counsel that it had no right to cut or take such timber; and that said removal was wilful, reckless, in bad faith, and without justification in law or morals.

IV.

Defendant was Not Operating Under the Lease, or as a Stockholder in the Supply Co.,—Otherwise it would be Liable to the College for the Violations of the Provisions of the Lease.

Defendant was a stockholder in a company which never claimed the right to operate generally on the grant. The sole claim of the Supply Co. was that it had the right to take timber *under the conditions set out in the Van Dyke lease*. Some of those conditions are printed herein (*supra*, *p.* 11). The Supply Co. was bound to perform those conditions. The Sulphite Co. as a stockholder in the Supply Co., on January 5, 1893, had executed independent covenants and guarantees that those conditions should be faithfully performed (*supra*, *p.* 14, 11 Record, *p.* 150). The Sulphite Co. was itself liable to the college (under the principles of subrogation) for every breach of the condition of that lease. When the defendant acquired the 480 shares from the Sulphite Co. it succeeded not only to the rights *but to the liabilities of the Sulphite Co.*, as stockholder.

When the defendant entered, when it cut, and when it removed the timber, it was liable under the guarantee of the Sulphite Co., January 5, 1893, for all damages which the college might sustain by reason of the entry, cutting, and removal being in violation of the lease.

Chisholm knew about this guaranty and if, about January and February, 1899, he made a full and honest disclosure to Jennings of all material facts within his knowledge, Jennings must have advised that the defendant was so liable. He was required to state all the facts (see Appendix B). It is to be presumed that he did state them. *The concealment of Jennings' advice is forceful evidence that he had been told the truth about these matters*, and that, when they removed the timber, defendant was chargeable with the knowledge of its president and general counsel that the conditions of the lease had been grossly violated, that defendant was liable therefor, and that if they should pretend to base their operations under the lease, they were bound *to make and return a full and complete scale bill*, to pay the college "*before the timber should be removed from said tract*," and that *the title to the timber was then in the college and would remain there until payment should be made.*

They do not pretend to base these operations on the authority of the lease. Burbank says he did not know of the lease until the summer of 1899. Chisholm knew, but says he does not remember now. Thomas knew but says he did not tell. When they re-examined their legal position after the letter of February 10, they either knew all the facts and wilfully shut their eyes and took the chances, or their examination was wilfully and intentionally an unmitigated farce.

After consulting counsel they bury his advice so deep that it has not yet been found, and without notice to the college or any one, and without payment to the college or any one, took the timber which they knew was not theirs and for the wrongful taking of which they knew they were liable not only as trespassers, but by the written guaranty of January, 1893.

Was this an exhibition of good faith or bad faith?

V.

Defendants' Ownership of 480 Shares (6-30) no Justification and no Basis for Claim of Innocence or Good Faith.

They were simply stockholders. They had no other rights.

(1) The by-laws gave them no authority to operate (*supra*, *p.* 12, Art. xi, *ss.* 1–5). Under by-laws the Supply Co. was to operate and each stockholding company was to "*take and pay for, at the price named for stumpage by the directors as aforesaid, the quantity of timber received by it in its boom each year and shall pay its share of operating expenses for that year, etc.*" (*Supra*, *p.* 13.)

(2) They say they did not know what the by-laws were until about February 10 (Burbank Dep., *pp.* 38, 39, Ints. 161, 168, 169, 172). *Burbank then got the idea*, so he says, that they could cut because they owned one fifth the "property,"—meaning 1-5 stock in Supply Co.

(3) When they conferred about February 10, Burbank and Chisholm proposed to take that timber anyway and take their chances. They were hunting for some sort of excuse. So Burbank says *he* got that idea—not that his counsel got it, but *he* got it. *Where did he get it?*

Not from Jennings, for Jennings knew that as a stockholder in the Supply Company, the defendant had no right to take timber from the college lands.

Jennings has carefully avoided saying that *he got "that idea"* and from

putting himself in a position where he would be compelled to say anything about "*that idea.*" Burbank and Chisholm have studiously refrained from saying that Jennings ever had such an idea or that Jennings ever suggested "*that idea*" to them.

These men could not have acted in good faith on "*that idea,*" because it is fathered by the wrong man. In that emergency, Jennings, the skilful lawyer, was the man to determine the legal rights of this defendant and not the layman Burbank, without knowledge or experience, and, as Chisholm says, holding his position temporarily and only until the defendants could find the "*right man*" to put in his place (Chisholm Dep., *pp.* 156–7, Cross Int. 26, 27, *supra*, *p.* 51).

"*That idea*" that defendant could cut because it was a small stockholder is discredited, because it does not come from the right man. The only right man to set up as its father is Mr. Jennings, but Mr. Jennings, in effect, denies its paternity.

If defendants were acting in good faith in these transactions, whose ideas of their legal rights would they be likely to follow, Burbank's or Jennings'?

They must regret that the present exigencies drove them to try to base their good faith on "*that idea*" of Burbank's rather than on some other idea for which Mr. Jennings might be willing to assume some small responsibility.

We submit that no scintilla of good faith can be found in what this defendant, through its officers, said or did with reference to the taking of the timber; and that the taking was reckless and wilful.

VI.

Waste.

THE DEFENDANTS' OPERATORS FAILED TO TAKE 2,003,661 FEET OF MERCHANTABLE TIMBER IN LARGE TOPS AND TREES CUT DOWN AND LEFT ON THE GROUND.

The defendants do not deny this, but seek to evade paying for it by a variety of excuses, none of which, however, are sustained by the proof.

The defendants attack the report made by Mr. Gile and Mr. West on various pretexts; but notwithstanding the zeal and ingenuity of counsel, and Mr. Amey and Mr. Macey, the report stands practically unaffected. Correct-

ing all errors in figures, Macey gets within 20,000 feet of West estimates (Macey, II Rec., *p.* 611, Int. 209). Mr. Amey does not deal with anything so definite as figures, but contents himself with general aspersions. Most of the objections are entirely fanciful, and those which possess any real merit relate to microscopic errors not affecting the general result.

The percentage method used by Gile and West may be tested by comparing with computations based on area. The following table is submitted for this purpose. The two Wilson and the Sturtevant operations are omitted because not surveyed:

TABLE SHOWING WASTE COMPUTED ON AREA.

Name of Operator.	Number of Acres.	Waste Per Acre.	Aggregate Waste by Area.	Aggregate Waste by Percentage.
Maxwell	132	827	109,164	100,313
Hanscomb	148½	802	119,097	112,320
Beecher	184	512	94,208	93,798
G. L. Thurston	447	980	438,060	413,020
Delong	101	402	40,602	44,140
Annis	113	600	67,800	97,512
R. B. Thurston	310	720	223,200	237,091
Bennett & Taylor	112	1,232	137,984	126,714
A. L. Davis	201	590	118,590	210,018
Q. B. Davis	345½	734	253,597	265,090
Total	2,094		1,602,302	1,700,016

Mr. Gile and Mr. West, whose qualifications cannot seriously be questioned, went onto the Grant in the summer of 1899, for the purpose of making a fair and honest examination of the cuttings to ascertain exactly what had been taken and what had been left (I Rec., *pp.* 137–38). They used the customary method (*Ib.*, *pp.* 85, 145). They took measurements on average half acres by which they can give the contents of all trees taken, and of the wasted timber. They ran the tops to such diameter and measured such small trees as they considered merchantable timber (Gile, I Rec., *p.* 95; West, *p.* 189), under logging methods then in use (West,

I Rec., *pp.* 300–1; II Rec., *p.* 60). They made their report in due course, and it is now before the court, showing the amount of merchantable timber left on the ground to be 2,037,665 feet (I Rec., *p.* 194, Ex. 3). This was corrected to 2,003,661 feet, by Maxwell and Hanscomb operations 34,004 feet, to the standard finally adopted (I Rec., *p.* 402).

The defendants began contriving means to escape paying for this timber in the fall of 1899, when they selected Mr. Amey, whose experience theretofore had been confined to the Connecticut valley, as principal expert, and sent him, with others, to look over the work done by Gile and West, and to plan, if possible, to destroy its value to the plaintiff. They were assisted in this by the ill-advised and unwarranted liberality of plaintiffs' counsel, who turned over all the data at the Eagle Hotel conference in January, 1900 (I Rec., *p.* 179 *et seq*). The defences then begun have now developed into several distinct propositions, by which the defendants hope to reduce the plaintiffs' claim to a minimum.

1. First, they suggest that these operations were conducted in the manner commonly employed in that vicinity.

It is obvious that logging methods must vary with the purpose of cutting the timber, the use to be made of it, the locality, the requirements of contracts, and the care and skill of the operators. As the defendants' most positive testimony on this point came from witnesses whose experience has been confined to the Connecticut, with little or no knowledge of Androscoggin methods (Amey, II Rec., *p.* 201; Gilmore, *Ib.*, *p.* 573; Fickett, *Ib.*, *p.* 590; Pike, *Ib.*, *p.* 596; Hickey, *Ib.*, *p.* 612), we wish the master to note the difference in logging methods in the two valleys, as shown by the testimony.

The retention of the uncertain Bangor scale on the Connecticut (Amey, II Rec., *p.* 294; Jordan, I Rec., *p.* 493), after the change to the Blodgett scale on the Androscoggin (West, II Rec., *p.* 60; Macey, *Ib.*, *p.* 467; the Coe Permits, Ex. 28 to 34, and operations described in testimony of practically all defendants Androscoggin witnesses), is typical of the retention in the former of old-fashioned and wasteful logging methods, discarded on the Androscoggin since lumber became valuable for pulp (Bearce Dep., *p.* 41, Ints. 48, 49).

The difference in saving the smaller timber is equally apparent. On the Androscoggin they had been running out tops to 6 inches and taking

all small trees to 16 feet long, 6 inches at top, for some time prior to 1898–'99, for example:

On Stetsontown, 1894–'95 (West, I Rec., *p.* 300), the general practice (West, II Rec., *p.* 60).

On Berlin Mills Company land, 1894, and Coe land, 1896, and his own land in 1896–'97 (Brown, II Rec., *pp.* 50, 51). That was the practice (*Ib.*, *p.* 52).

On Phillips Brook by International, logs going to Berlin (Macey, II Rec., *p.* 463), Thomas using that method (*Ib.*, *p.* 468).

On Success, 1892 (*Ib.*, 470–1; Hancock, *p.* 525).

On Stark for six years, logs going to Berlin (Pike, II Rec., *p.* 599 *et seq.*); hauled them three to six miles on logging road (*Ib.*, *p.* 601).

On Kilkenney, logs going to Berlin (Hickey, II Rec., *p.* 616), anything 6 inches at top, 4 feet long would go (*Ib.*, *p.* 618). Hauled five miles. (*Ib.*)

On Letter D Township, logs going to Rumford Falls, 1896–'99 (H. J. Brown Dep., *pp.* 99, 104). Logs cut as they grew, and shortest six inch log was long enough (*Ib.*, *p.* 102).

On Coe's land, stumpage bought by Thomas for defendant, 1898 to 1901 (Coe Permits, Ex. 28 to 34). "All spruce trees which are of a larger size than 14 inches at the stump, and all fir trees which are of a larger size than 10 inches at the stump, are to be cut and hauled . . . but no trees of less size are to be cut except where necessary for the making of roads, yards, or landings, in which case *this smaller growth so cut down is to be hauled. . . . No part of the felled trees which will make merchantable lumber or pulp stock is to be left in the woods.*" (Coe permit.)

No such practice was known on the Connecticut. Jordan cut to 8 or 9 inches, according to his contract, and did not put in anything smaller (Jordan, I Rec., *pp.* 440, 464, 469.) Not much change in thirty years. (*Ib.*, *p.* 491, *et seq.*) Never operated with Blodgett scale (*Ib.*, *p.* 493) or with contract to run to 6 inches (*Ib.*, *p.* 495).

Mr. Amey, with all his experience, is not acquainted with operations for pulp stock (Amey, II Rec., *p.* 294). Never operated where ran tops to 6 inches, which is unusual on Connecticut (*Ib.*, *p.* 303). Stuff smaller than 20 feet long, 7 inches at top not much account on Connecticut (*Ib.*, *p.* 360). Do not try to take trees cut out of roads below 20 feet long, 8 inches at top (*Ib.*, *p.* 364).

In view of these marked differences, the opinions of Connecticut river experts can be of little weight.

Thomas' course in letting these contracts and afterwards neglecting the common precautions to insure proper methods, could hardly fail to result in waste and destruction of valuable timber. These operators knew of Van Dyke's operations for three years for *saw logs*. (Sturtevant Dep., *pp.* 76, 149; Q. B. Davis Dep., *p.* 214). Van Dyke's example must have had a large influence on subsequent operations on the Grant. The operators and sub-operators had no written contract or instructions how to cut. (Sturtevant Dep., *pp.* 51, 58; Q. B. Davis Dep., *p.* 177). Q. B. Davis had to *guess* at it (*Ib.*, *p.* 240). There was absolutely no superintendence. (Wilson Dep., *p.* 12; Sturtevant Dep., *p.* 61; Q. B. Davis Dep., *p.* 811, and other Errol depositions). Thomas paid no attention to the matter. (Thomas, I Rec., *p.* 50, *et seq*). The neglect of these customary and necessary steps (Bearce Dep., *p.* 44; Macey, II Rec., *p.* 503; Annis Dep., *p.* 518), left the jobbers free to leave the small trees and tops, and confine their hauling to the large timber, which, as Jordan says, is more profitable to them (Jordan, I Rec., *p* 465).

All this waste might have been avoided by the observance of the ordinary practice of making definite contracts (Bearce Dep., *p.* 44; Annis Dep., *p.* 518), by reasonable supervision of the work, and by permitting the landowner to know that the operation was going on.

2. The defendants undertake to justify this waste and destruction by the plea that in spite of Thomas' neglect these operations were done as well as the *average*. Their experts say:

"No different from other cuttings." (Jordan, I Rec., *p.* 433.)

"The average about same as elsewhere." (Amey, II Rec., *p.* 291). He says his standard contemplates taking trees as large as 8 inches 20 feet from ground, larger trees topped off at 8 inches, but taking out *nothing smaller* (Amey, II Rec., *p.* 367),—somewhat below the Androscoggin standard.

"Cuttings *as general rule* cleanly done *on the whole*" (Macey, II Rec., *p.* 449) but jobs varied in excellence (*Ib.*, *p.* 482). How he reconciles this opinion with his testimony about other jobs where 6-inch limit prevailed, is not clear.

"Jobs done as well as *average*" (Hancock, II Rec., *p.* 515).

"Operations compare *fairly well* with operations in *general*."] (Hodgdon, II Rec., *p.* 550.) "On *average*, cut *about* as well as other jobs" (*Ib.*, *p.* 559).

"Jobs *averaged pretty well* with *average* of other jobs." (Wentworth, II Rec., *p.* 569).

"Cut *practically* as we cut timber." (Gilmore, II Rec., *pp.* 575–6). Gilmore has operated for saw logs for ten years (*Ib.*, *pp.* 574, 585).

"Did not see *very much difference* from other jobs." (Fickett, II Rec., *p.* 592.)

"Should say jobs were *fair average.*" (Leavitt, II Rec., *p.* 681.)

There is no pretence that these operations were as good as the best works the witnesses knew about. All the Androscoggin witnesses, and part of the others, admit that operations were being conducted in that valley or for timber used in that valley, in many places where the practice was to run all trees to 6 inches, and take out all small trees down to 16 feet by 6 inches and smaller.

Macey (II Rec. *p.* 463) describes International works on Phillips Brook, by this standard, which Thomas used generally (*Ib.*, *p.* 468); used on Success since 1892. (*Ib.*, *p.* 470.)

Hancock (II Rec., *p.* 525) testifies about operations on Success to 6 inch limit, and on Cambridge. (*Ib.*, *p.* 529.)

Wentworth (II Rec., *p.* 571) carried on similar operations in Grafton, 1895 to 1898.

Pike (II Rec., *p.* 599 *et seq.*) says that for six years he has been cutting in Stark, taking tops to 5 or 6 inches; small trees, 16 feet by 5 inches, hauling timber 5 or 6 miles on logging road, and sending to defendant at Berlin.

Hickey (II Rec., *p.* 616 *et seq.*) describes a similar operation by him in Stark, the logs going to the defendant.

This testimony clearly supports Mr. West in adopting his standard for estimating the waste. We submit that the plaintiffs are entitled to have this question of waste determined, not by Mr. Amey's 20 foot, 8 inch standard, but by the standard of the best operations, where the landowners' interests are protected by requiring all the merchantable timber to be hauled and scaled within the limits named, as the defendant was doing on its own land, as the Berlin Mills Company was doing, as Coe was requiring, and as modern conditions demand.

The individual operators are not particularly to be blamed, nor need their testimony, that their operations were well done, be discussed. They naturally defend themselves and their friends and neighbors. No doubt the size limit, 20 feet, 8 inches, led them to believe that smaller timber

was not wanted. (See Hickey, II Rec., *p.* 626; Wilson Dep., *p.* 32; Sturtevant Dep., *p.* 142.) Maxwell told his choppers that smaller trees would not be scaled. (Maxwell Dep., *p.* 353.) Davis did not suppose they wanted small timber. (Q. B. Davis Dep., *p.* 185.) It is true that they did not run tops even to 8 inches in most cases (see West's report); but it may be they cut them where they scaled best (see *infra*) by the method employed by the scalers.

The percentage of waste, varying on the different jobs for 9.7 per cent. for Sturtevant to 25 per cent. for Q. B. Davis and others, shows a wide variation, due, no doubt, to the varying tendency of the different operators, left to themselves, to take advantage of the situation.

If they had all done as well as Sturtevant, the plaintiffs' loss would have been reduced by over 800,000 feet of timber. (Computed from West's Report.) The defendants have tried to make scapegoats of Bennett & Taylor. It is to be noted, however, that their percentage of waste, 20 per cent., is better than Maxwell's, Hanscomb's, and Q. B. Davis', 25 per cent.. and as good as G. L. Thurston's.

3. The defendants also advance the theory that, so far as the tops are concerned, they have benefited the college by leaving a considerable portion of the trees in the woods, because, as they say, the logs scaled better without the tops.

This argument is based on the arbitrary 2 inch rise method of handling the Bangor rule. (Amey, II Rec., *p.* 385.) The operators say they cut off their timber where it would scale best by the Bangor rule (see, for example, G. L. Thurston Dep., *p.* 443), which demonstrates that that method was used by the defendant's scalers, as West says (I Rec., *p.* 187). We are relieved of the necessity of discussing the correctness of the operators' belief in this subject, because it is clear that the plaintiffs, as owners of the stumpage, were entitled to have the more favorable Blodgett rule applied, not only because its use had been adopted for the protection of landowners, but because that rule is prescribed by law. (P. S., *c.* 128, *s.* 5, *Rogers* v. *Allen*, 47 N. H. 529; see West, I Rec., *p.* 125.)

Macey testifies that with the Blodgett rule it was customary to run trees to 6 inches. (Macey, II Rec., *p.* 463.) The operators testify that if the scale had been by that rule they would have taken tops and small trees to 6 inches. (Wilson Dep., *p.* 33; Sturtevant Dep., *p.* 141; Maxwell Dep., *p.* 357; R. B. Thurston Dep., *p.* 401, and other Errol

depositions.) There can be no question that if this rule had been used, the wasted timber would have been saved.

It is not conceivable, however, that by the proper use of even the Bangor rule, giving the actual rise to logs run beyond 8 inches, a part of a tree will scale more than the whole unless in exceptional cases. Mr. West testifies, *without contradiction*, that with proper sealing, taking out all tops to 6 inches would increase the scale by an amount equal to the seprate scale of the tops, basing his opinion on actual tests (West, I Rec. *p.* 384).

4. The assumption of some of defendants' experts that leaving trees is justified by the fact that they were cut out of roads or otherwise used in the lumbering operation is evidently unsound. Such trees are expressly specified in the Coe Permits (Ex. 28 to 34). Many of defendants' experts testify to the practice of hauling such timber; and their contractor, Sturtevant, says that he should not call it good operating to leave trees which he had to cut down (Sturtevant Dep., *p.* 142). Good logging requires taking out part of side logs (Hodgdon, *p.* 556). Bedding should be used so that it can be taken if good timber (A. L. Davis Dep., *p.* 473; Annis Dep., *p.* 520.)

5. The defendants' chief excuse for leaving this wasted timber is that it would cost more than its value to fit and haul it. In trying to support this idea they devise a stock question to ask their experts, involving taking out every stick on the land, even to corduroy and side logs buried up beyond recovery. We make no claim to which such testimony is applicable. We do not include in our estimate of waste the timber in camps, bridges, side logs buried up, wharfing, or corduroy (II Rec., *p.* 889). Amey and Macey could find only two instances where side logs were referred to in their extended notes (Macey, II Rec., *p.* 459). The lodged trees and trees which fell back are included, because the number of such trees must depend quite largely on the degree of care exercised by the chopper; but these are a small factor (Hodgdon, II Rec., *pp.* 554–56).

That this kind of timber is valuable is best shown by the fact, which every one knows, that it is actually hauled and used—and no one knows this better than do these defendants. Instances of such practice in all sections of the Androscoggin valley are fully described in the testimony of West, Brown, Macey, Hancock, Hodgdon, Wentworth, Pike, Hickey, and Polley, and in the Coe Permits, and need not be repeated here. That practically all the larger operators on the Androscoggin are pursuing this

method at a loss will require more proof than the assertion of Mr. Amey *et als.* It may be that jobbers by Bangor scale, with a two-inch rise, can make more money by leaving this timber and cutting down other larger trees; but with a proper scale, we confidently assert that jobbers cannot afford to build camps, tote supplies, build yards and landings, cut roads, and cut down the trees, and leave almost 20 per cent. of the timber behind.

We have shown the master just the amount and character of this wasted timber. Our case is based on facts rather than the circumscribed opinion of expert witnesses. We submit this branch of the case with confidence that the defendants will be required to respond in damages for the unrestrained carelessness of their jobbers.

VII.

Value.

The plaintiffs' claims on the question of value, at such times and places as may be material in view of the conflicting positions taken by the parties as to the time and place of the conversion of the plaintiffs' property, are as follows:

1.	Value of stumpage on Grant, 1898–'99, per thousand, over,	$4.00
2.	Value of logs at time of severance, per thousand, over,	4.75
3.	Value of logs at landings, per thousand, over,	8.00
4.	Value of logs at Rumford Falls, per thousand, over,	10.50
5.	Value of pulp, per ton,	15.00
	or per thousand of logs,	26.75
6.	Value of merchantable timber in tops, and trees cut and left, if considered separately, on stumpage basis, per thousand,	3.00
7.	Value of same at time of severance, per thousand,	4.00

Our belief is that, of the foregoing, only 1, 5, and 7, namely, the value of logs at Rumford Falls, the value of pulp manufactured from the plaintiffs' logs, and the value, when severed, of merchantable timber cut and left on the ground, when severed, are material in this case.

The defendants have produced little direct evidence on any of these points, but leave the plaintiffs' evidence practically undisputed.

1. Value of Stumpage, 1898–'99.

Three classes of testimony have been introduced on this point:

1. The opinions of competent witnesses.
2. Sales of stumpage similarly located.
3. Value of logs in market, less expense of taking to market (see Amey, II Rec., *p.* 345, Int. 667).

The first standard is presented by E. I. Brown and West for the plaintiffs and Hancock alone for the defendants. Thomas' deposition (*pp.* 41, 57, Ints. 182, 260) to the effect that he called the price of stumpage on their own land that year $3.00 does not purport to relate the stumpage on Dartmouth, which he admits would be worth $3.50 on the same basis as their own at $3.00, viz., the cost to the defendants of their own logs in the Rumford boom (*p.* 40, Int. 174); and Thomas makes no allowance for the difference between a straight and sound scale and the pulp scale which was used on his own logs (see Macy, II Rec., *p.* 468 *et seq.*, Int. 132 *et seq.*; *p.* 609, Ints. 392, 400).

Hancock's qualifications are very slight. Most of his experience has been on the Penobscot, while on the Androscoggin he has occupied a subordinate position with Blanchard & Twitchell. It appears that he knew what they paid Coe for stumpage by a contract made in 1892 (II Rec., *p.* 521, Ints. 68, 69), and had been told of a sale in Errol in 1899–1900 (Int. 74), a small operation (*p.* 535, Int. 163), of which no adequate description is given. That is all he knows on the subject.

E. I. Brown apparently has had more experience with the actual handling and dealing in logs and stumpage on the Grant than any one else, from 1893 to the present time (see Brown, II Rec., *p.* 21, Int. 11 *et seq.*), and large experience on his own account and for others elsewhere (Ints. 14, 28, 29 *et seq.*, 32, 37, 39, 78–81). He states without qualification that the stumpage was worth $4.00, and gives convincing reasons for his opinion (II Rec., *p.* 31, Ints. 50, 52 *et seq.*). His testimony is confirmed by his subsequent purchase of the remaining stumpage at $3.50 (Int. 123), partly located back of defendants' works (Int. 59), but principally (40,000,000 feet) on Four Mile Brook, costing fifty cents extra to drive out (Int. 61), and the Little Dead Diamond, all of which had to be two-sledded a long distance and driven further (see West, II Rec, *p.* 65, Int.

24; Ints. 28, 30; Ints. 262, 264, 265, 267; Amey, *p.* 352, Ints. 697, 704, 711; Polley, *p.* 661, Int. 239 *et seq.*).

It should be noted that Thomas permitted his operators to get their timber where they pleased, without supervision or interference (see citations, *supra*, in argument on waste). As Mr. Brown says, this is very different from being obliged to cut from the stream back to the height of land and take the timber clean (II Rec., *p.* 30, Int. 49; see also contract made by Brown with Davis, 1895–'96, A. L. Davis Dep., *p.* 470).

The additional expense of driving timber out of Four Mile Brook (*supra*) and of two-sledding, seventy-five cents for the first mile and twenty-five cents for each additional mile (Amey, II Rec., *p.* 343, Int. 651), makes the value of Brown's stumpage one dollar to one dollar and a half less than that which defendants took.

Mr. West has also had great experience and opportunity for observation in his employment by Mr. Coe, Blanchard & Twitchell, the Berlin Mills Company, and others (I Rec., *p.* 117 *et seq.*); in the practice of his profession (*p.* 123); in dealings in stumpage in 1898–'99 (II Rec., *p.* 92); in advising others (*pp.* 95, 110, 111); in his knowledge of actual sales (Int. 231), among others at $3.50 on Township C, in 1895–'96 (Int. 221), and at $4.00 above Berlin in 1898–'99 (Int. 241); and other information on same subject (Int. 244). His testimony that this stumpage was worth $4.00 is fully supported by the reasons he gives for his opinion.

The defendant's failure to produce reliable testimony to contradict Brown and West on this point is a practical admission that their testimony is correct.

The second standard of value, namely, sales of stumpage similarly located, introduces a class of testimony which must be considered with great discrimination. The varying conditions of individual instances make accurate deductions practically impossible. In practice, such evidence is useful principally as a test of the opinions of individual witnesses.

The entire cut on the Grant was sold to Van Dyke in 1888 for $1.25, a price which is valuable in this case only as showing the advance since then. When the Supply Company bought the lease in 1893, they called the price from $1.85 to $2.00 (Emery, II Rec., *p.* 752). The next summer, 1893, Emery and Fletcher thought stumpage worth about $2.50

(*ib.*). No price appears after that until 1899, when Brown paid $3.50 for stumpage much less favorably located (see discussion, *supra*).

The sale by Coe to Bearce & Wilson in 1896–'97, on Wentworth Location was at $3.00, size limit 9 inches at 16 feet, practically the same as under the lease (Bearce Dep., *pp.* 49, 52, 59). All this timber was two-sledded about three miles (same, *p.* 60, Int. 13), and about one third was landed on College Grant at Ellingwood Falls (same, *p.* 32, Int. 24), and sold to Berlin Mills Co. for $7.50 (same, *p.* 35). The defendants' operators two-sledded only about 15 per cent. of the entire cut, Bennett & Taylor, 600,000, R. B. Thurston, 700,000 (West, II Rec. *p.* 108), and G. L. Thurston, 400,000, making 1,700,000 in all; and they built no new two-sled roads (Brown, II Rec. *p.* 34, Int. 63; R. B. Thurston Dep., *p.* 408, Int. 212; West, II Rec., *p.* 67, Int. 33.) The map and the testimony show that the average haul from Wentworth Location was at least two miles more than the average haul in 1898–'99. The additional two-sledding makes the difference in favor of the college stumpage at least $1.00 (Amey, *supra*, Bearce Dep. *p.* 40, Int. 50), without making allowance for advance in prices in two years.

The only other stumpage contracts in the case are the Coe Permits whose introduction under the circumstances led the master to say that the evidence would probably not do the defendants much good or the plaintiffs much harm (II Rec., *pp.* 919–20.)

The location is remote, the character of the timber is not stated, and all the other conditions are unexplained. *The defendants do not even produce their contracts with their jobbers who cut the timber* (II Rec. *p.* 941). In spite of Macy's guess that it could be operated cheaper than on the Grant, though he admits knowing nothing about the price paid (II Rec., *p.* 941), the master will hardly believe that logs can be cut and hauled, driven down stream, towed across lakes, and hauled out and loaded on cars for $3.50 per thousand. Then it costs $2.80 per thousand to get them to market as against $1.75 or less from the Grant (see *infra*). At $3.00 in such localities the stumpage the defendants appropriated would be worth more than $4.50.

We call attention to the difference of $1.00 in price in the same permit (Exhibit 30) for stumpage on adjoining lots, an illustration of the effect of varying conditions on stumpage values.

Other sales referred to in the testimony are in 1895–'96 in Cambridge,

from which the logs were driven down small streams and towed across Umbagog lake, price $3.50 (West, II Rec., *p.* 98, *p.* 100); and sales in the Androscoggin valley above Berlin in 1898–'99, price $4.00 (same, *p.* 101).

It should be noted that the operators in 1898–'99 took the timber which came to the landing the most easily and cheaply, a condition largely enhancing the value of the stumpage.

The third standard, namely, the market value less cost of delivery, still further emphasizes the soundness of our position. We show below (*p.* 79) that logs at Rumford Falls at this time were worth about $10.50 per thousand. The cost of delivery is made up of two items, namely, cutting and hauling, and driving, both being clearly established by the evidence.

The defendants paid $3.50 per thousand for cutting and hauling all but 400,000 feet, paying $4.00 for the latter (Sturtevant Dep., *p.* 65; Q. B. Davis Dep., *p.* 178). The work was sublet at prices varying from $3.00 to $3.50, and the average price actually received by all the operators was $3.40 (computed from depositions of operators taken at Errol). The actual expense must be the final test, relieving us and the master of trying to decide why Amey *et als.* all testified that the job was worth $4.00 to $4.25. Their zeal appears better than their judgment or their credibility.

The cost of driving is unquestionably fixed by Mr. Brown at $1.50 to $1.75, and defendants' counsel did not dare to cross-examine him. His experience for many years in succession qualifies him beyond question. He drove the logs for defendants in 1898, and they paid the bills and must have them (Emery, II Rec., *pp.* 837, 851). Their failure to produce them is an absolute admission that Brown's testimony is correct. Christopher Reed drove these logs in 1899, but the defendants keep him in hiding and suppress his bills of expense. They put on Mr. Gilmore who had charge of a drive in 1889, which he says he has practically forgotten all about, and he thinks it is worth $2.50; but even he admits the river has been "improved some" since then (II Rec., *p.* 578). Mr. Amey's guess is $2.00 (II Rec., *p.* 369) "on information."

The value of logs at Rumford, $10.50, less the expense, $5.25, leaves $5.25 as the value of the stumpage *to the defendants.*

Logs on the landings in 1896–'97 were worth and sold for $7.50 (Bearce

Dep., *p.* 35, see *infra*). With the cost of operating, $3.50, stumpage must be worth at least $4.00, with no allowance for increase in prices in two years.

No allowance need be made for the 500,000 feet of fir, because the defendants paid $1.00 less per thousand for logging fir (Sturtevant Dep., *p.* 72; Q. B. Davis Dep., *p.* 200), which represents the difference in value between the two, as shown by defendants' contract with the Berlin Mills Co. (H. J. Brown Dep., *p.* 104).

We ask the master to consider, in a general way, as bearing upon the damage sustained by the plaintiffs, that in view of the large increase in the value of stumpage since this trespass, the stumpage taken by the plaintiffs was more valuable to leave standing than to sell (Sturtevant Dep., *p.* 149, Int. 706); and that cutting out the most available timber injures the value of the remainder.

2. Value of Logs When Severed.

The general rule of damages for conversion of timber trees, as stated in *Beede* v. *Lamprey*, 64 N. H. 510, is the value of the trees when first severed, that is, the value of the stumpage with the cost of cutting added. We will accept Mr. Amey's estimate of this, namely, 75 cents to $1.00 per thousand (Amey, II Rec., *p.* 307); consequently, according to the most favorable rule *which the defendants can expect*, the plaintiffs are entitled to recover from $4.75 to $5.00 per thousand, with interest.

3. Value of Logs at Stream.

If the removal of the logs from the Grant after the notice of February 10, 1899, should be held to constitute the conversion for which the defendants are liable, the value of the logs at the landing will become a material question. There can be little dispute about this. In 1896–'97 the Berlin Mills Company paid $7.50 for logs delivered on the Grant (Bearce Dep., *p.* 35.) Every one knows that timber advanced during the years following (*Ib.*, *p.* 40).

In 1898–'99, the defendants were paying the Berlin Mills Co. $7.50 for logs loaded on cars at shipping points on Letter D township (H. J. Brown Dep., *p.* 104), pulp scale. The cost of getting these logs to Rumford Falls was $2.80 per thousand (see *infra*), as against $1.75 from the Grant.

The purchase by Sturtevant from Flint of 100,000 feet of logs at $7.00 (Sturtevant Dep., *p.* 160) is of little account. Owners of small quantities of logs are at a disadvantage in selling; and the fact that part of those logs were cut over Flint's line on the Grant (West, II Rec., *p.* 892), would have a strong tendency to depress the price. Moreover, there is no evidence as to the quality of the logs. The defendants' failure to produce any other evidence on the point is extremely significant.

We submit that the evidence clearly establishes the value of the logs on the landings at more than $8.00 per thousand.

4. Value of Logs at Rumford Falls.

The only reliable evidence on this point is the actual cost to the defendants of the logs it bought in 1899 from the Berlin Mills Co. We find that Thomas made a contract for 11,000,000 feet, pulp scale, delivered on cars on Letter D township, for $7.50 (H. J. Brown Dep., *p.* 104). The freight on these logs to Rumford Falls was $2.80 per thousand (Libbey's Affidavits, II Rec., *pp.* 18, 949). The special rebate of twenty cents could not affect general values, and did not go into effect till July 1, 1899. Adding a reasonable expense for unloading, and making a fair allowance for the difference between pulp scale and a straight and sound scale, and the fact that the seller sorted out 10 per cent. of the best logs, it is plain that $10.50 is a conservative estimate for the cost of logs like the plaintiffs'. It should also be noted that the Berlin Mills Co. logs were run out to six inches, "the shortest being long enough." (Brown Dep., *p.* 102.)

Thomas' testimony that logs were worth only $9.00 is evidently based solely on the cost to the company of the particular logs in their boom which they had cut on their own land, arbitrarily assuming the value of stumpage as $3.00 (Thomas Dep., *p.* 41). It is apparent, however, that he would not have paid over $10.50 in cash, as he in fact did, for large quantities of logs unless that were a reasonable price. On this point as on others, the defendants' failure to produce testimony in their control, is a virtual admission that the plaintiffs' position is correct.

5. Value of Pulp.

This is practically agreed upon at $15.00 per ton. (II Rec., *p.* 16.)

One thousand feet of logs will make 3,500 or 3,600 pounds of pulp. (Fletcher, II Rec., *p.* 713.)

6 and 7. Value of Waste.

It will be demonstrated that the merchantable timber left on the Grant, amounting to 2,003,661 feet, should have been taken in connection with the operations, and paid for at a fair stumpage price. If taken separately, it may be of less value. None of defendants' witnesses testified on this point, but were confined to an impossible hypothesis constructed by defendants' counsel, involving the removal of every individual stick, including camps, bridges, corduroy, and all. Mr. West's testimony is uncontradicted that this property, considered separately, was worth $3.00 per thousand (II Rec., *p.* 69). The cost of severance should be added, under the rule stated in *Beede* v. *Lamprey*, 64 N. H. 510.

VIII.

Interest.

In case of an innocent trespass, interest is computed from the date of severance. *Beede* v. *Lamprey*, *supra*. An average date would be about December 1, 1898.

In case of wilful trespass, interest should be figured from the date of the writ, July 12, 1900.

IX.

Statement of the Law Applicable to the Facts Established.

The plaintiffs claim,—

(1) The damages recoverable in this case are the full value

(a) Of the logs remaining at Rumford Falls, July 12, 1900 (date of writ), 3,575,290 feet at $10.50 per M,	$37,540.55
(b) Of the pulp then manufactured from 8,000,000 feet of logs, equivalent to $1\frac{3}{4}$ tons pulp per M feet, or 14,000 tons pulp at $15 per ton,	210,000.00
(c) Of 2,003,661 feet merchantable timber left on Grant, at $4.00 per M,	8,014.64
Total,	$255,555.19

Add interest from date of writ on items (a) and (b) and from December 1, 1898, on item (c).

The foregoing, not including interest, represents the value of the property in the condition in which it was found when the suit was brought, without deduction for the labor or expenses of the defendant.

The authorities in support of the foregoing claim are set forth in Appendix A, *infra*, *p.* 87.

(2) The trespass having been committed recklessly and through culpable negligence, and the defendant having wilfully refrained from inquiring as to the nature of its supposed rights and having no reasonable grounds for believing it had a right to cut—such conduct constituted a wilful trespass or its legal equivalent, and renders the defendant liable for the foregoing values.

The authorities in support of this proposition are stated in Appendix A II, *infra*, *p.* 91.

(3) The defendant's conduct in wilfully converting the logs after unmistakable knowledge of the plaintiffs' ownership was brought home to it by the letter of February 10, and after its investigation of the charges therein, renders the defendant liable for the foregoing values, whether the original entry was wilful or innocent.

The authorities will be found in Appendix A III, *infra*, *p.* 95.

(4) Upon the facts shown, the burden is upon the defendant to prove good faith, and not upon the plaintiff to prove wilfulness.

For the authorities, see Appendix A IV, *infra*, *p.* 81.

(5) The defendants' bad faith, recklessness, and wilfulness is conclusively established not only by other evidence, but also by the fact shown, that before removing the timber, it submitted the question of its legal rights and liabilities to its learned general counsel, and did not act in good faith on the advice of counsel, but removed the timber after being advised that it had no legal right so to do. The plaintiffs claim that upon the facts shown such advice is to be conclusively presumed, and ask the master so to rule.

The general authorities relating to the legal effect of seeking advice of counsel and not acting in good faith upon such advice will be found in Appendix B I, *infra*, *p.* 100.

(6) The fact that defendant consulted counsel, it not being shown by defendants what advice the counsel gave, is no defence to the charge of wilfulness.

See authorities, Appendix B II, *infra*, *p.* 101.

(7) The fact that defendant consulted counsel, and then acted, raises no presumption that counsel advised them so to act.

See Appendix B III, *p.* 103.

(8) The plaintiffs claim the right to recover in this action, independently of the assignment by the Supply Company, for all the timber taken (11,575,290 feet) and for all merchantable timber left, whether said timber was "first cuttings" or "second cuttings," so called—whether the Supply Company under the lease had rights in a part of the timber cut—whether a part of the damages do or do not belong to the Supply Company. The college *has never parted with its title* to the timber taken or cut and left. In the executory contract (or lease) with Van Dyke, it specifically reserved title to the timber until paid for (*supra*, *p.* 12).

For authorities as to the right of the college to maintain trover for all the property converted by defendant. See Appendix C, *infra*, *p.* 104.

(9) Whatever part of the damages recovered herein may belong to the Supply Company, *as between the college and that company*, will be held in trust by the college for that company.

Benjamin v. *Stremple*, 13 Ill., 466, and other cases cited in Appendix C.

The apportionment of damages between the college as lessor and the Supply Company as lessee will be determined by the contract of June 9,

1900 (*supra p.* 7, II Rec. 173), but is not a material inquiry in this case.

(10) In this action the defendant cannot set up the defense that part of the logs taken may be the property of the Supply Company, for it has not shown and does not claim any right to cut based on the authority of the Supply Company.

Bradley v. *Spofford*, 23 N. H. 444.
Harrington v. *Tremblay*, 61 N. H. 413.
McKean v. *Converse*, 68 N. H. 173;
Stevens v. *Gordon*, 87 Me. 564.

(Cited in Appendix, *p.* 106.)

(11) The plaintiffs may recover in this suit for the logs and pulp converted at Rumford Falls and for the merchantable timber cut and left on the Grant.

Barron v. *Davis*, 4 N. H. 338, Appendix D, *infra*, *p.* 107.

X.

Reasons for Applying the General Rule of Law in this Case.

The lands were granted by the state to the college for educational uses. They cannot be alienated. The income must be applied by the trustees "wholly and exclusively" to assist the education of indigent youths. (*Supra*, *p.* 11.)

The conditions of the Van Dyke lease show that the college was trying to manage the cutting of timber so as to preserve the forest, afford a perpetual supply, and furnish an uninterrupted annual income. In November, 1898, they were told that no cuttings would be made that season.

But this defendant, a stranger, with no intimation of its purpose, secretly and lawlessly sent its operators on the Grant without supervision, and slashed down 13,575,000 feet of timber, of all sizes, left 2,003,661 feet of merchantable quality on the ground to rot and waste, took away 11,575,290 feet and converted most of it into pulp before the college could find out the truth, and turned the money proceeds of nearly $300,000 into their treasury, where presumably it now remains.

The rule of damages which we seek here to have applied is founded on reason and common sense.

In the Pine River Logging Co. case (186 U. S. 295–1902), the court, reviewing the authorities, expresses its final opinion that the rule "that an intentional trespasser or a purchaser from him shall have no credit for the labor he may have expended on the property at the time of its conversion *as an eminently proper and wholesome one.*" Every reason there given by the court in support of the rule is here accentuated.

The court refer to the "logging concerns gradually gathering to themselves all the valuable timber of the country" which was reserved for other purposes, and say that:

> "If trespassers were permitted to escape by the payment of the mere stumpage value of the standing timber, there would be a strong inducement upon the part of these operators to avail themselves of every opportunity of seizing this timber, since they would incur no greater liability than the payment of a nominal sum. It is only by denying them a credit for their labor expended upon it that the government can obtain adequate reparation for this constantly growing evil, and trespassers be made to suffer some punishment for their depredations."

If these depredations of the college lands may be satisfied by the payment of stumpage, the modern economic theory of preserving the forests is an idle dream and may as well be abandoned.

The defendants contend that if a "logging concern" covets a tract of fine timber it may take it, and the owner, after years of intolerably expensive litigation in the Federal courts, may get stumpage value for the timber which he was trying to preserve and of which he has been deliberately and wilfully robbed.

In the face of the opinion of the Supreme Federal Court such a rule cannot be here adopted.

XI.

Delays.

The defendants took this timber four years ago last winter. They had converted most of it into pulp worth $210,000 when the writ was brought three years ago this month. They had on hand plaintiffs' logs of a value of $37,540.55.

We think the master will agree that plaintiffs' counsel have diligently prosecuted the action. The defendants have formally admitted their trespass and become default. The only question is one of damages.

In three years we have come to a hearing before a master. The defendants hold the proceeds of the timber taken. The college has nothing therefor except a lawsuit.

Under these circumstances does not justice to these parties require an early decision?

APPENDIX A.

Authorities on Question of Wilfulness.

I.

The Measure of Damages for the Conversion of Property by a Wilful Trespasser is the Full Value of the Property in the Condition in which it is Found when the Suit is Brought, without Deduction for the Labor or Expenses of the Defendant.

Bolles Woodenware Co. v. *United States*, 106 U. S. 432, is the Federal leading case upon this subject. It was an action in the nature of trover for the value of timber knowingly and wrongfully cut and removed from the public lands by Indians, carried by them to the distant town of Depere, and there sold by them to the defendant, which was an innocent purchaser having no knowledge of the trespass. The value of the timber on the ground after it was felled was about $60; at the time and place where defendant bought it, $850. Held, that the defendant was liable for the latter sum.

The court lay down the rule of damages as follows:

> "In an action for timber cut and carried away from the land of plaintiff, the measure of damages is:
>
> "1. Where the defendant is a knowing and wilful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction for labor and expense of the defendant.
>
> "2. Where the defendant is an unintentional or mistaken trespasser, or his innocent vendee, the value at the time of conversion, less what the labor and expense of defendant and his vendor have added to its value.
>
> "3. Where defendant is a purchaser, without notice of wrong, from a wilful trespasser, the value at the time of such purchase." (Headnotes by Mr. Justice Miller.)

That the court would have applied the same rule of damages had the defendants been the original trespassers, is shown by the following excerpt from the opinion:

"By reason of the wilful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, *for the value of the timber at Depere the moment before he sold it;* and the question to be decided is whether the defendant who purchased it then, with no notice that the property belonged to the United States and with no intention to do wrong, must respond by the same rule of damages *as his vendor should if he had been sued.*"

Pine River Logging & Improvement Co. v. *United States*, 186 U. S. 279 (June 2, 1902). Action for the conversion of timber on an Indian reservation. Certain Indians, having a statutory right to cut and sell, with the approval of the Commissioner of Indian Affairs, a limited amount of "dead and down" timber from said reservation, contracted with the defendants, with the approval of said commissioner, to cut and deliver to defendants 2,750,000 feet of such timber. The Indians in fact cut and delivered, and the defendants accepted, over 17,000,000 feet, a large portion of which was green and growing timber. Upon these facts a verdict was directed for the government for the enhanced value of the timber when cut and banked upon the stream. Held, that the amount of timber delivered so grossly exceeded the amount authorized to be cut that the parties could not have supposed they were cutting within their rights, and that defendants had no ground of exception.

The court say:

"The case of *E. E. Bolles Woodenware Co.* v. *United States*, 106 U. S. 432, is decisive of the law in this connection . . . It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. . . .

"The cases involving this distinction and in line with the *Woodenware Case* are abundant, both in the Federal and state courts, and are too numerous even for citation."

Fisher v. *Brown*, 70 Fed. Rep. 570 (C. C. A., 6th Circuit)• Action for conversion of lumber. The plaintiff made a contract with one J to sell J, for cash, the timber on certain land owned by plaintiff. J did not pay the cash, but, "expecting to do so" (*p.* 570), went on and cut the timber without plaintiff's permission and used it to fulfil a lumber contract he had with the defendants. By the contract between J and the defendants, J was to deliver the logs at defendants' mill; but defendants were to advance money to J for the improvement of the logs as soon as the logs were skidded, and were to have the title to the logs as security for said advances. The defendants were innocent purchasers, having no knowledge that the logs were wrongfully cut, and advanced money and took a supposed transfer of title when the logs were skidded, in accordance with the contract. Held, that the defendants were liable for the value of the logs on the skids.

The court state the rules of damages laid down in the *Woodenware Case*, and say:

> "The foregoing rules . . . are based on the equitable doctrine that a wilful trespasser should not be reimbursed for any outlay he has knowingly made on another's property with the intent to appropriate it to his own use, while a man who innocently appropriates another's property, and expends labor and money on it to increase its value, should be allowed compensation for its increased value. . . .
>
> "The question here is how these rules are to be applied to a case where an innocent purchaser from a wilful trespasser, in anticipation of an absolute purchase and on the faith of a good title to the property in his vendor, advances money to be expended in improving its value, and to be credited on account of the purchase money when the property is delivered in its improved condition, and takes from the vendor a transfer of title to the property in its unimproved condition, pending the completion of the contract, to secure advances thus made. Under such circumstances we think the measure of damages should be fixed as of the time when the first advances were made by the innocent purchaser."

It will be observed that, in the opinion of the Circuit Court of Appeals for the Sixth Circuit, the fact that J, when he wrongfully cut the timber, expected later to pay the cash and thereby obtain a right to cut it, did not relieve him from the character of a wilful trespasser.

Powers v. *United States*, 119 Fed. Rep. 562 (C. C. A., 6th Circuit, 1903). Trover for the conversion of lumber. The court say (*p.* 567):

> "The measure of damages in such cases depends upon the question whether the defendant contributed value to the article converted, with knowledge that he had no right to thus deal with it. . . .
>
> "The law looks to the state of mind with which the act itself was done to see if it was of a character to so infect the improvement as that the actor ought to be deprived of all benefit from his outlay.
>
> "The rule laid down in the case of *Bolles Woodenware Company* v. *United States*, 106 U. S. 432, *and which has ever since been followed in the federal courts*, was this:
>
> "When the defendant is a wilful trespasser, the plaintiff is entitled to recover the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense. But when the defendant is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he or he and his vendor have added to its value, constitutes the measure of damages. Later cases where this rule has been followed and applied, are: *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U. S. 428; *United States* v. *Mock*, 149 U. S. 273; *Fisher* v. *Brown*, 37 U. S. App. 407, 17 C. C. A. 225, 70 Fed. 570; *Gentry* v. *U. S.*, 41 C. C. A. 185, 101 Fed. 51; *U. S.* v. *Van Winkle*, 51 C. C. A. 553, 113 Fed. 903."

See, also, *Potter* v. *United States*, 122 Fed. Rep. 49, 53 (C. C. A., 8th Circuit, 1903).

Powers v. *Tillay*, 87 Me. 34. Held, that "In an action of trover against a purchaser of sleepers made from trees cut on the plaintiff's land by a trespasser, and by him manufactured into sleepers, the measure of damages is the value of the sleepers at the time of their conversion by the purchaser.

"No deduction therefrom is to be made for the increased value put upon the trees by the labor of the trespasser before conversion by the purchaser."

Wing v. *Milliken*, 91 Me. 387, was an action of trover to recover the value of one hundred and fifty thousand feet of sawed birch spool stock, manufactured from lumber cut on plaintiff's land. No conversion was claimed until the lumber was manufactured into spool stock.

The court say (*p.* 391):

"The measure of damages ordinarily in an action of trover is the value of the property at the time of conversion with interest from the time when the cause of action accrues.

"In the present case we are unable to perceive any reason for departing from the general rule, and allowing damages only for the value of the birch when severed from the land, as contended by the defendant."

II.

If the Trespass was Committed Recklessly, or through Culpable Negligence,---If the Defendant Wilfully Refrained from Inquiring as to the Nature of its Supposed Rights, or had no Reasonable Grounds for Believing it had a Right to Cut,---Such Conduct Constituted a Willful Trespass or its Legal Equivalent, and Renders the Defendant Liable for the Enhanced Value.

Bly v. *United States*, 4 Dillon 464 (U. S. C. C., Dist. Minn., 1877, before Dillon and Nelson, JJ.) Actions in the nature of trover to recover the value of saw-logs cut upon the public lands by the defendants or their vendors, and which, before the suits were commenced, had been rafted and brought to the boom. The court say, with reference to the measure of damages:

"Where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the government, *or who has no reasonable ground to believe that it belongs to him, or to some one under whom he claims*, and such logs are by him hauled to the watercourse, and rafted and taken to a distant boom, by means of which labor of the wrongdoer their value is much enhanced beyond their value when first severed from the freehold, the government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value, and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold, by the labor of the wrongdoer. In such case the government is not confined to what is called the "stumpage" value, but may recover the value of the logs in the boom. . . . As against the *wilful or negligent* trespasser, the rule of damage indicated is not unjust, and as against his vendee it is perhaps the logical and necessary result of the property in the logs still remaining in the government. . . .

"There is a class of cases, English and American, which hold that where coal or mineral ore is taken by one person from the land of another, the ordinary measure of damages in trespass or trover is the value of the coal or mineral when it first became a chattel, or was converted, and not the value of the coal as it lay in the earth. . . . The cases last referred to have generally

> arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is *fraudulent*, *or wilful*, *or negligent*."

United States v. *Williams*, 18 Fed. Rep. 475 (C. C., Dist. Oregon, 1883). Action for damages for cutting timber on the public lands. In discussing the applicability of the Wooden-Ware case, the court say at *p.* 478:

> "On the argument it was practically admitted by the counsel for the plaintiff that the timber cut by the defendants in the summer of 1881 was cut by mistake. But it is not apparent how the mistake was made; *nor is it shown that any pains or care was taken to prevent or avoid the mistake. If the mistake was the result of carelessness or indifference, I do not think it is such a mistake as ought to excuse the defendants from paying damages as wilful trespassers.*" (Citing *Winchester* v. *Craig*, 33 Mich. 207.)

United States v. *Taylor*, 35 Fed. Rep. 484 (C. C., Alabama, 1888). Action for trespasses committed on the public lands. The court say that the jury may give exemplary damages "if the going on the land and cutting and chipping the trees, or the dipping and removing of the turpentine, was done by the defendant *wilfully*, *or as the result of negligence so gross as to show wilfulness or a reckless indifference to the rights of the government.*"

In *Mining Co.* v. *Turck*, 70 Fed. Rep. 294 (C. C. A., 8th Circ., 1895), which was an action for the conversion of ore, the court say, at *p.* 299, "The damages awarded by the jury must have been assessed upon the theory that the defendant was not a wilful trespasser, but that it had acted under a *justifiable* claim of ownership." The court evidently understood that the trespass was wilful unless defendant's claim of ownership was "justifiable," *i. e.*, based upon reasonable grounds.

Durant Mining Co. v. *Percy Mining Co.*, 93 Fed. Rep. 166 (C. C. A., 8th Circ., 1899). Action for taking ores from plaintiff's mining claim. The mining claims of plaintiff and defendant companies adjoined each other, and the ore in question was taken out by defendant many hundred feet below the surface, and right on the line between the claims. The evidence as to whether the

taking was wilful or inadvertent was conflicting. The court below charged the jury that "It is the duty of one who carries on work in his own territory to ascertain the location of his lines," and that "if he fails in that respect he is not at liberty to say that . . . it was not wilful or intentional."

Held, that the above instruction was erroneous, because "if this were a true statement of the law, there never could be an inadvertent and unintentional trespass." But the Circuit Court of Appeals say (*p.* 167):

> "It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them."

In *Golden Reward Mining Co.* v. *Buxton Mining Co.*, 97 Fed. Rep. 413 (C. C. A., 8th Circ., 1899), which was an action for wrongfully entering upon plaintiff's property and removing and converting ores therefrom, the court say at *p.* 422:

> "If the trespass was committed wilfully and intentionally, *or if the trespasser was so far negligent as to justify an inference that he acted knowingly and intentionally*, then he may be held liable for the value of the ore taken, with interest thereon from the date of the conversion; such value to be estimated at the mouth of the mine, without any allowance for the expenses which the trespasser may have incurred in breaking and raising it."

United States v. *Homestake Mining Co.*, 117 Fed. Rep. 481 (C. C. A., 8th Circ., 1902). Action for the conversion of lumber and cord wood cut and removed from the Black Hills forest reserve. The question was as to the measure of damages. The court say:

> "The measure of damages for the *reckless*, wilful, or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. . . . This rule, and every other rule which measures the damages caused by trespassers, does not call the righteous, but sinners, to restitution. . . . The law, in its wisdom, perceives the marked difference in the heinousness of the offences of those who *recklessly*, or with actual inten-

> tion to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose, no actual, wilful intent to commit a wrong. . . . The question, then, is, did the trespasser violate the law, which he constructively knew, *recklessly*, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a wilful trespasser, and the value of the manufactured timber or the extracted ore measures his liability."

Smith v. *Baechler*, 18 Ontario 293 (Q. B. Div., 1889). Trover for the conversion of logs. Defendant's sawmill was situated within a mile of plaintiff's lands. One H. obtained a right to cut timber on land adjoining plaintiff's, and contracted to sell a quantity of logs to defendant. A large number of the logs which H. delivered to defendant were cut from plaintiff's land. The bulk of these were hauled over a road which led from plaintiff's land into defendant's mill yard; H.'s choppers boarded at defendant's mill; and a son of defendant was shown to have been present once when the men were cutting on one of the plaintiff's lots. The defendant testified "that he was never in the woods that winter; that he never asked where the logs came from; and that he did not think it was his business to make inquiries." On these facts the court said:

> "I think the defendant must be taken to have known, under the circumstances, that he was buying logs which were being taken from the plaintiff's land, *or if he did not actually know it, that he must have strongly suspected it, and wilfully abstained from inquiry.* . . . It is not doing him an injustice to assume him to have either had actual knowledge of the robbery which was being daily committed, *or to have wilfully shut his eyes to it.* I think this is a case in which the defendant should be charged the value of the logs as they were in his yard at the time the plaintiff served the demand on him, without any deduction for the cost of cutting and hauling them."

St. Clair v. *Mining Co.*, 9 Colo. App. 235. Trespass for taking ore from plaintiff's vein. The court say:

> "If the defendants had taken out the ore, not as the result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation, *or the circumstances were such as legally to charge them with this knowledge*, they . . . may not reduce the amount of recovery by proving

> the cost of mining. . . The defendants *took the chances* of being called on to respond in damages for whatever they might take out without regard to the cost of extraction, unless they were entirely able to satisfy the jury that what they did was done in the utmost good faith and on *a fairly well-founded belief* of what they claimed were their rights."

In *Whitney* v. *Huntington*, 37 Minn. 197, it was held that:

"In an action for the conversion of logs which had been cut by a trespasser upon the plaintiff's land, the measure of damages is the value of the standing timber, and not the greatly increased value of the logs, if the trespasser honestly *and reasonably* believed that his conduct was rightful, *he not having been culpably negligent or regardless of the rights of others.*"

King v. *Merriman*, 38 Minn. 47. Action for the value of timber cut and carried away by defendant. The court say (*p.* 54):

> "The only other question is the measure of damages. . . . This court has adopted the following rules upon this subject as applicable to cases of this kind:
>
> "1st. Where the defendant is a wilful trespasser, the full value of the property at the time and place of demand.
>
> "2d. Where he is an unintentional or mistaken trespasser, or, as expressed in *Whitney* v. *Huntington*, where he honestly *and reasonably* believed that his conduct was rightful, the value of the property at the time it was taken,—that is, the value of the standing timber."

In *Hoxsie* v. *Lumber Co.*, 41 Minn. 548, an unintentional or mistaken trespasser, as distinguished from a wilful trespasser, is defined as one who "honestly *and reasonably*" believes that he has authority to cut and remove the logs.

III.

The Defendant's Conduct in Wilfully Converting the Logs after Unmistakable Knowledge of Plaintiff's Ownership was brought Home to it Renders it Liable for the Enhanced Value, whether the Original Entry was Wilful or Innocent.

Heard v. *James*, 49 Miss. 236, was replevin for a quantity of staves. "The proof was, that the line between the lands of the plaintiff and the land of the adjacent proprietor, upon which the

defendants had the right to make staves, was blazed; that defendants were notified that they were cutting upon the plaintiff's land; they however cut down and used eighteen white oak trees to make the staves; that defendants never paid plaintiff for the timber or the staves, but hauled them to the depot at Byram, for shipment to New Orleans." The jury returned a verdict for plaintiff for the full value of the staves at New Orleans prices at the time the suit was brought, viz., when they were on the cars at Byram for shipment. Held, that the verdict was correct.

The court say (*pp.* 246, 247):

> "The tendency of the modern cases is to hold that if by mistake, or without intentional wrong, trees are cut and converted into some other forms more valuable, the jury ought to deduct from the estimation the value of the time, labor, and skill bestowed upon them by the defendant. But on the other hand, if the defendant has been a wanton or willing trespasser, *or if after his mistake as to the ownership was discovered, he does not act fairly with the plaintiff*, then the jury may disregard a partial or full estimation of the enhanced value."

United States v. *Baxter*, 46 Fed. Rep. 350 (C. C., Dist. Washington, 1891). Trespass against Baxter and Hansen for cutting timber on the public lands. The principal question was whether defendants were liable for the enhanced value of the logs at the boom. The court say:

> "There was no evidence that tended to show that Hansen was mistaken as to where he was cutting the timber set forth in the complaint. Baxter, it is true, claims a mistake as far as he is concerned. It is attempted to separate Hansen and Baxter in this transaction; that is, to hold that, although Hansen may not have been mistaken, yet, if Baxter was, there should be one judgment for damages against Baxter and another against Hansen. I do not think this can be done. . . . *Although notified that a wilful trespass was committed, Mr. Baxter has never repudiated the trespass, and delivered up to the United States the fruits of the same, and turned to Hansen for a redress of his wrongs.* He is holding on to the fruits of Hansen's wilful trespass, and says, 'I ought not to be held responsible for his wilfulness.' *Under such circumstances, Baxter ought to be considered as ratifying the wilful tort of Hansen.*"

IV.

The Burden is Upon Defendant to Prove Good Faith, not upon Plaintiff to Prove Wilfulness.

In *United States* v. *Baxter*, just cited, the court further held that "In an action of trespass by the United States for cutting timber on government land *the burden of showing that the timber was cut by mistake, with a view of mitigating the damages, is upon the defendants;* and, in the absence of evidence to that effect, there is no error in permitting the government to recover the value of the saw-logs when already brought to the water." (Headnote 2.)

The court say, on motion for a new trial:

> "It is evident from the evidence that the trespass complained of was committed upon government land. Every man is presumed to have intended to do what he did do. This is a rule in criminal as well as civil actions. When the evidence shows that a man has committed an unlawful act, *if it was done on account of a mistake, that is for him to show.* If Hansen and Baxter cut the timber set forth in the complaint, *it was for them to show it was done by mistake, not the United States to show there was no mistake on their part.* When the trespass was shown, the presumption was that it was intentional, wilful.
>
> "It is claimed that, because the complaint shows that the trespass was wilful, the United States should have proved this fact before it could recover for the value of the timber cut as logs at Quartermaster harbor. It was not necessary to allege that the trespass was wilful. The law does not require that the aggravations accompanying a tort should be alleged. 1 Suth. Dam. *p.* 766. . . . If the defendants had been able to show that there was a mistake in cutting this timber, the amount of damages would have been materially reduced. But, as stated above, the defendants are in law presumed to have intended to do what the evidence shows they did do. There was no evidence that tended to show that Hanson was mistaken as to where he was cutting the timber set forth in the complaint." (*Pp.* 352, 353.)

United States v. *Homestake Mining Co.*, 117 Fed. Rep. 481 (C. C. A., 8th Circ., 1902). Action for the conversion of lumber cut from public lands. The question was whether the mining company was a wilful trespasser and therefore liable for the enhanced value of the manufactured product. The court say:

> "It is conceded that the taking of the timber from the land of the United States *raised the presumption of fact that it was wilfully*

> *and intentionally taken.* But this is only a disputable presumption. . . . When the government rested its case, *the legal presumption of a wilful trespass which might have arisen from the unexplained cutting and removal of the timber by the defendant* was completely overcome." (*Pp.* 486, 489.)

Powers v. *Tillay*, 87 Me. 34, 36. Trover for railroad sleepers. The logs from which the sleepers were made had been cut on plaintiff's land by trespassers, and by them manufactured into sleepers and sold to the defendant. The charge of the trial judge to the jury, holding the defendant liable for the value of the sleepers without deduction for the labor of the trespassers, was held correct, the court saying:

> "It has sometimes been held that where the trespass was involuntary and not wilful, the owner should recover his actual loss, and not the increased value added by the trespasser. . . . But where the trespass is wilful, the courts adopting the mitigating rule of damages against involuntary trespassers allow the full value of the property in the condition in which it was at the time of the conversion. *If defendant claimed that the trespass was not wilful, it was for him to show it before he could ask any mitigation of the ordinary rule of damages.* We find no such evidence in the case."

Hoxsie v. *Lumber Co.*, 41 Minn. 548. Action for the conversion of saw-logs which one O'Brien had cut from plaintiff's land and afterward sold to defendant. The court say:

> "As it was conceded that defendant bought the logs of O'Brien in good faith, the only question left, bearing upon the proper measure of damages, was whether O'Brien was a wilful trespasser. . . . Of course, if it appeared that the act of cutting was a trespass, *the presumption, in the absence of any contrary showing, would be that it was wilful, and the burden would be on the trespasser to show that it was not.*"

St. Clair v. *Mining Co.*, 9 Colo. App. 235. Trespass for taking ore from plaintiff's vein. The court say:

> "The entry by the Berkin owners across the end line of a patented claim and the pursuit of that development within its limits was not done in ignorance of the plaintiff's rights, and in doing that work the defendants took the chances of being called on to respond in damages for whatever they might take out without regard to the cost of extraction, *unless they were entirely able to satisfy the jury that what they did was done in the utmost good faith and on a fairly well-founded belief of what they claimed were their rights.*

Locators of mining claims which are projected across patented property take all the risks incident to the pursuit of ore within the limits of that claim, and being found to be trespassers, must respond in damages to the highest limit of recovery *unless they are able to satisfy the jury of the honesty of their purpose and the good faith with which they did their work.* . . . The court was bound to submit to the jury the question of good faith, of honest purpose and fair intention, and *tell the jury that unless they reached the conclusion the trespass was not a wilful one, the whole evidence in regard to the cost of extraction was foreign to their deliberations and should not be taken into account in determining what the plaintiff might recover.*"

APPENDIX B.

Advice of Counsel.

(*Supra*, *p.* 61.)

I.

Authorities Generally.

Eastman v. *Keasor*, 44 N. H. 518, 520. Case, for malicious prosecution. In discussing the rule that acting *bona fide* upon the advice of counsel, the case having been fully and fairly laid before the counsel, is competent to rebut malice and show probable cause, the court say, "It is the fact of the opinion [*i. e.*, advice] having been given that is material."

Monaghan v. *Cox*, 155 Mass. 487, 489. The court thus state the necessary elements of the defense of advice of counsel in actions for malicious prosecution:—"To establish the defence, it is required of the party . . . that he shall act in good faith, believing that he has good cause for his action, and not seeking to procure an opinion in order to shelter himself; that he shall make a full and honest disclosure of all the material facts within his knowledge or belief; that he shall be himself doubtful of his legal rights and shall have reason to presume that the person to whom he applies, or whose advice he follows, is competent to give safe and prudent counsel; *and that he shall honestly pursue the directions of his adviser.*"

Jackson v. *Bell*, 58 N. W. Rep. 671. Held, that "In order to relieve a defendant from liability in an action for malicious prosecution, on the ground that he acted on the advice of counsel, it must appear that he made a full and complete statement of all the facts known to him relevant to the prosecution, *and was afterwards advised to institute such prosecution, and that he acted on such advice of counsel in good faith*, believing the plaintiff to be guilty of the crime with which he was charged."

Wetmore v. *Mellinger*, 14 N. W. 722 (Iowa). Action for malicious prosecution. Held, that "The advice of counsel, on a full and fair statement of the material facts and information

within his knowledge, will not protect a party *unless he acted in good faith under the advice received in instituting the suit.*"

Kingsbury v. *Garden*, 45 N. Y. Super. Ct. 224. Action for malicious prosecution. Held, that " Merely showing that counsel, after a full and fair statement to him of all the facts, advised the prosecution, without showing the further element that the party *in good faith acted on the advice*, is insufficient of itself to show probable cause."

Cole v. *Curtis*, 16 Minn. 182, 203. Action for malicious prosecution. The jury were instructed " That where a party consults counsel before instituting proceedings, if he does not state all the facts within his knowledge to his counsel, or if he misrepresents the case, or *does not act bona fide under the advice received*, or does not himself believe the accused is guilty of the crime charged, he is not protected by the advice given." Held correct. The court say, "Good faith in acting under the advice of counsel is necessary in order to protect the party."

O'Neal v. *McKinna*, 22 So. 905 (Ala.). Action for malicious prosecution. Defendant requested an instruction that if he made a full statement of all the facts to his lawyer, and said lawyer thereupon advised that the prosecution could be maintained, the verdict should be for defendant. Held properly refused, because it omitted the essential requirement that defendant must have acted in good faith on the advice.

To the same effect are

Merchant v. *Pielke*, 84 N. W. 574;
Biddle v. *Jenkins*, 85 N. W. 392;
Wuest v. *Am. Tobacco Co.*, 73 N. W. 903;
Kehl v. *Compress Co.*, 77 Miss. 762.

II.

The Fact that Defendants consulted Counsel, it not being Shown what Advice the Counsel gave, is no Defence to the Charge of Wilfulness.

Holden v. *Merritt*, 92 Iowa 707, 712. Action for malicious prosecution. Held, that " It is not a defense that an attorney was

consulted, when he gave no advice and simply referred defendant to the United States marshal." (Syllabus.) The court say:

"Defendant testified that he first went to see Mr. Thompson regarding the matter of prosecuting plaintiff, and said that Thompson advised him to go to Francis. The court, on motion of plaintiff, struck out all the testimony in regard to what he told Thompson. This ruling was correct. While Thompson was an attorney, he did not give the defendant any legal opinion upon the facts, and defendant does not claim that Thompson advised him that the facts stated amounted to a crime."

Mauldin v. *Ball*, 104 Tenn. 597, 600, 601. Action for malicious prosecution. The trial court charged the jury that if defendant "went before a justice of the peace and fairly and fully laid all the facts before him, and honestly sought his advice for the purpose of bringing what he supposed to be a criminal to justice, then he had a right to bring the suit." The supreme court say: "We think this charge faulty in two respects. In the first place, it states, in substance, that if the party sought the advice of the justice of the peace honestly, then he had a right to bring the suit, and the law protects him, without regard to what advice the justice gave him. The charge, if correct at all, should have gone further, and stated that if the party sought the advice *and the justice of the peace gave it*, then it would protect; but he does not so state, *but simply makes the matter turn upon the seeking of the advice, without regard to what advice, as a matter of fact, was given.*"

Mentel v. *Hippely*, 165 Pa. St. 558. Action for malicious prosecution. Defendant offered to prove "that after a statement made by the defendant to the magistrate of the occurrences upon which the charge of larceny was based, that officer took the information and issued the warrant." Held, that the trial court rightly rejected the proffered testimony, because "it did not go to the extent of showing that the prosecution was commenced *under the advice of* the magistrate." (The court declined to pass on the question whether the advice of a magistrate, like that of an attor-

ney-at-law in good standing, was competent to rebut malice and bad faith, for the reason that the offer of proof did not raise the question.)

III.

The Fact that Defendants consulted Counsel, and then Acted, raises no Presumption that the Counsel advised them so to Act.

Davidoff v. *Wheeler & Wilson Mfg. Co.*, 37 N. Y. Supp. 661, 663. (Supreme court, appellate term.) Action for malicious prosecution. Held, that "The fact that defendant, in an action for malicious prosecution, consulted counsel, and subsequently instituted the prosecution on which the action is based, does not raise a presumption that the prosecution was advised by counsel." (Syllabus.) The court say:

"It is claimed that the court erred in refusing to charge, in effect, that if the defendant's action was based upon advice of counsel, given after a full and fair statement of the case, the plaintiff could not recover. *The question of advice of counsel, however, was not in the case, since it does not appear that any advice was given favorable to the action taken.* True, the defendant consulted counsel, and subsequently instituted these criminal proceedings, but whether upon advice of counsel or not is a matter of surmise merely. Therefore, the ruling was not erroneous."

APPENDIX C.

Right to Maintain Trover for all Property Converted by Defendant.

Ames v. *Palmer*, 42 Maine 197.

Suit by consignee to recover damages for conversion of a cask of rum which the defendants took from possession of the carrier by an unlawful process. The carrier had a lien for unpaid freight. Held, that while the carrier had a right to retain possession as against the general owner until his freight was paid, and while it may be conceded that in trover a plaintiff cannot recover without proof of property in himself and the right of immediate possession, still, the carrier's lien did not deprive the plaintiff of his right to immediate possession as against a wrongdoer, and that this plaintiff might recover.

"The lien, therefore, of a common carrier, does not deprive the owner of the goods of his right of immediate possession, as against a tort feasor."

Benjamin v. *Stremple*, 13 Ill. 466.

Trover, by officer of a temperance society, having the custody of its regalia, to recover value of the regalia which defendant had wrongfully seized for a debt. Held, that the plaintiff might recover the entire value.

"In an action of trover by the bailee of a chattel, or one having a special property therein, against the real owner, the plaintiff can recover the value of his special property only; *but if the action is against a stranger, he is entitled to recover the full value of the article, and he holds the balance beyond his special interest in trust for the general owner, to whom he is responsible over.*"

White v. *Webb*, 15 Conn. 302.

Trover, by a second mortgagee, who had taken possession of the goods, against a sheriff who attached the goods as the property of the mortgagor. Held, that the plaintiff might recover the entire value of the goods and was not limited to the amount of his own

debt. The court uses practically the same language as in *Benjamin* v. *Stremple*, *supra*.

See, also, *Chamberlin* v. *Shaw*, 18 Pick. 278;
Ingersoll v. *Van Bokkelin*, 7 Cowen 670.

Poole v. *Symonds*, 1 N. H. 289.

Held, that a keeper appointed to hold property taken on an execution may maintain trover against one who converts the property without right. The opinion by Richardson, C. J., contains a discussion of the questions of title and possession as affecting the right to maintain trover, and arrives at the conclusion that one who has the possession or the right to possession may maintain trover. See opinion, *p.* 291.

"Thus it seems that any person, who has an absolute or a special property, in a personal chattel, and a right to reduce it to immediate possession, has in law such a possession as will enable him to maintain an action to vindicate his right of possession, and this is what the law denominates a constructive possession."

See, also, *Bartlett* v. *Hoyt*, 29 N. H. 317.

Jones v. *Sinclair*, 2 N. H. 319.

The owner of goods delivered to a trader on consignment may maintain trover against a sheriff who attaches them on a suit against the trader.

"The next objection is that the plaintiff does not appear, at the time of taking the property, to have had either actual possession or the right to the actual possession of it. But though this principle applies in substance to trover as well as to trespass, yet in the former action, the point of time to which the right of possession refers is the conversion and not the taking; or, according to *Gordon* v. *Harper* (7 D. & E. 9) is the commencement of the action rather than the taking."

Drake v. *Redington*, 9 N. H. 243.

The owner of a cow, who has bailed it to another at a fixed sum per year, to keep until called for, may maintain trover against a third person converting the cow without right. His right of possession is complete at any time. The court cites with approval

Story on Bailments, 191, to the effect that in such case either the bailor or the bailee may maintain trover.

Bradley v. *Spofford*, 23 N. H. 444.

One who wrongfully converts goods, cannot, in a suit by the general owner, set up a lien in favor of a third party, a bailee of the goods, for work done thereon.

Town v. *Hazen*, 51 N. H. 596.

Where defendant converted wood which plaintiff had cut on land sold by him to defendant, reserving the wood, held that trover would lie.

Harrington v. *Tremblay*, 61 N. H. 413.

In an action of trover, the defendant cannot set up the defense of property in a third person without showing some right, title, or interest in himself, derived from such person.

McKeen v. *Converse*, 68 N. H. 173.

An agister of cattle may maintain an action against a person who converts them.

See *Hyde* v. *Noble*, 13 N. H. 494.

Wright v. *Guier*, 9 Watts (Pa.) 172.

An action of trover will lie by the owner of the legal title to land, to recover the value of wood cut by a trespasser.

Constructive possession of unoccupied land is sufficient to support trover as against a trespasser.

There is no difference, as regards occupancy, between a solitary trespass and repeated trespasses; and the occupancy of a trespasser who does not cultivate and enclose, continues no longer than he remains in contact with the soil.

See, also, *Church* v. *Bloom*, 82 N. W. 794 (Iowa), and cases cited;

Schermerhorn v. *Buell*, 4 Denio (N. Y.) 422;

Riley v. *Water Power Co.*, 11 Cush. 11.

Stevens v. *Gordon*, 87 Maine, 564.

APPENDIX D.

Right to Recover for Several Conversions in One Suit.

Barron v. *Davis*, 4 N. H. 338.

Upon a single count in trover, a plaintiff may recover the value of several articles taken and converted at several distinct times and places. Richardson, C. J., says:

"But in trover, the defendant is supposed to be in the possession of the goods lawfully, by finding, and the gist of the action is an unlawful conversion of them [the goods], while so in possession, to his own use. It is wholly immaterial how or at what times the goods may have gone into the possession of the defendant, because although he may have obtained possession of them by wrong, that wrong is waived, and the plaintiff seeks redress only for the wrong done by the defendant, in exercising a dominion over the goods, after they came into his possession, which was inconsistent with the plaintiff's right of possession and property. This exercise of dominion over the property may consist of various acts done at various times, the whole of which constitute the injury of which the owner complains. . . . It is sufficient to allege, generally, that the defendant converted the goods to his own use, and evidence of any acts of the defendant at any time previous to the commencement of the suit, inconsistent with the plaintiff's rights and property in the goods, is competent evidence to maintain the allegation."

APPENDIX E.

ORDER OF JUDGE ALDRICH, REFERRING CERTAIN ISSUES TO A MASTER.

(*Filed Sept. 10, 1902.*)

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

TRUSTEES OF DARTMOUTH COLLEGE

vs.

INTERNATIONAL PAPER COMPANY.

ALDRICH, J. Upon the record and the papers on file, and upon hearing the explanations of counsel of record, I find that, under the circumstances of this case, the quantity of timber or property involved in the alleged conversion cannot be conveniently or intelligently ascertained in the ordinary course of a jury trial.

I think, therefore, as a preliminary step in the direction of a solution of the difficulties, that the character of the cutting, size of the trees cut, and the quantity in feet may and should be ascertained by the court, or by a master, or commissioner.

When this is done, if there is a controversy as to the value at different times and places, and as to the question of wilfulness of conversion, the court will consider whether the situation is such as to present questions which require issues of fact to be framed for the jury.

The commissioner or the master will, if either party wishes it, make findings upon the questions intended to be left open for further consideration, to the end that they may be treated as conclusive, or as evidence to the jury, or of no consequence, as sound discretion or the law may require.

I do not think the plaintiff is entitled to a jury trial upon the general situation now presented, and the motion is, at present, denied upon the ground and for the purposes above stated.

For the above purposes, the case is referred to a master or masters, or a commissioner or commissioners, to be hereafter appointed.

Plaintiff protests and excepts and has six days in which to file exceptions.

The exceptions were duly filed.

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